TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 100

W. P. BROWN & SONS LUMBER COMPANY ET AL.,
PETITIONERS,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 3, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

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[fol. 1] [Caption omitted.]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

W. P. Brown & Sons Lumber Company, a Corporation; Edward Hines Yellow Pine Company, a Corporation; H. C. Berckes, Assignee of Claims of Wausau Southern Lumber Company, Marathon Lumber Company, Lehr Lumber Company, Long-Bell Lumber Company, Henderson-Molpus Company, Eastman-Gardner & Company, Rutledge & Company, J. R. Buckwalter Lumber Company, Gilchrist-Fordney Company, Natalbany Lumber [fol. 2] Company, Ross C. Smith and Hampton S. Smith, Trading and Doing Business under the Firm Name of Acme Lumber & Coal Company; Adams-Edgar Lumber Company, a Corporation, Successor to the Adams-Banks Lumber Company, a Corporation; E. B. Teague, J. E. Chandler & B. L. Frost, Trading and Doing Business under the Firm Name of Advance Lumber Company; The American Lumber & Export Company, a Corporation; Bagdad Land & Lumber Company, a Corporation; Birmingham Lumber Company, a Corporation; Burdette Lumber Company, a Corporation, Successor to McGinnis-Burdette Lumber Company, a Corporation; Albert Russell and T. R. Simmons, Trading and Doing Business under the Firm Name of Cleveland Lumber Company; W. R. Cochran, Executor of the Estate of C. W. Cochran (deceased), Trading and Doing Business under the Firm Name of C. W. Cochran Lumber Company; C. G. Duffee, Trading and Doing Business under the Firm Name of Duffee Lumber Company; Foster Creek Lumber & Manufacturing Company, a Corporation; A. J. Gray and E. W. McKinley, Trading and Doing Business under the Firm Name of Jefferson Lumber Company; O. D. Carlton, H. H. Hill, and J. T. Carlton, Trading and Doing Business under the Firm Name of King Lumber Company, a Partnership; S. E. Lackey, J. L. Lackey, and V. R. Lackey, Trading and Doing Business under the Firm Name of S. E. Lackey Lumber Company; M. E. Leake and R. F. Goodlett, Trading and Doing Business under the Firm Name of Leake & Goodlett; John J. Laumer

and J. M. Griffith, Trading and Doing Business under the Firm Names of Laumer Lumber Company and Laumer-[fol. 3] Griffith Lumber Company; Magic City Lumber Company, a Corporation; T. R. Miller Mill Company, Inc., a Corporation; J. W. Oden and J. J. Elliott, Trading and Doing Business under the Firm Name of Oden-Elliott Lumber Company; L. F. Garrett, Trading and Doing Business under the Firm Name of Pocahontas Lumber Company; The Pioneer Lumber Company, a Corporation, Reid Lumber Company, Inc., a Corporation; Schuster Springs Lumber Company, a Corporation; Jay Smith Lumber Company, a Corporation; Steel City Lumber Company, a Corporation; The Standard Lumber Company, a Corporation; West Florida Lumber Company, a Corporation; Wisconsin-Alabama Lumber Company, a Corporation; The Adams-Newell Lumber Company, a Corporation; L. A. Baker, Trading and Doing Business Formerly under the Firm Name of Baker-Dyer Lumber Company, Now under the Firm Name of Baker Lumber Company; Frost-Sibley Lumber Company, a Corporation; W. B. Harbeson Lumber Company, a Corporation; Watters-Tonge Lumber Company, a Corporation; Henry C. Brabston, Trading and Doing Business under the Firm Name of Henry Brabston & Company; The Parker Lumber Company, a Corporation; John F. Andrews, Trustee in Bankruptcy of Pine & Cypress Manufacturing Company, a Corporation; Nadawah Lumber Company, a Corporation; J. R. Thames, Trading and Doing Business under the Firm Name of J. R. Thames & Company; W. M. Carney Mill Company, a Corporation; [fol. 4] A. J. Lowry, C. C. Brownless, H. L. Haughton, J. P. Warner, Edwin S. Jack, and E. B. May, Trading and Doing Business under the Firm Name of Greensboro Lumber Company; E. V. Sanders, Trading and Doing Business under the Firm Name of E. V. Sanders Lumber Company; C. H. Sims and L. W. Morgan, Trading and Doing Business under the Firm Name of Sims-Morgan Lumber Company; D. F. Southard, J. B. Southard and B. M. Southard Trading and Doing Business under the Firm Name of Southard Lumber Company; Williams Yellow Pine Company, a Corporation; The First National Bank of Birmingham, Executor of the Estate of

E. A. Smith, Swift-Hunter Lumber Company, a Corporation, Plaintiffs,

vs.

Louisville & Nashville Railroad Company, Alabama and North Western Railroad Company, The Alabama and Vicksburg Railway Company, The Alabama Great Southern Railroad Company, Alabama, Tennessee & Northern Railroad Company, Apalachicola Northern Railroad Company, Atlanta & Saint Andrews Bay Railway Company, Atlanta and West Point Railroad Company, Atlanta, Birmingham & Atlantic Railway Company (B. L. Bugg, Receiver), Atlantic Coast Line Railroad Company; The Baltimore & Ohio Railroad Company; Bessemer and Lake Erie Railroad Company, Birmingham Southeastern Railroad Company, Birmingham, Selma and Mobile Railroad Company, Buffalo, Rochester and Pittsburgh Rail-
[fol. 5] way Company, Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, Lessee), Central of Georgia Railway Company, Chattahoochee Valley Railway Company, The Chesapeake and Ohio Railway Company, The Chicago and Alton Railroad Company (William W. Wheelock and William G. Bierd, Receivers), Chicago and Eastern Illinois Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railroad Company, Chicago, Indianapolis and Louisville Railway Company, Chicago, Milwaukee and St. Paul Railway Company (H. E. Byram, M. W. Potter, and E. J. Brundage, Receivers), Chicago, Peoria and St. Louis Railroad Company (William Cotter, Receiver), The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, Indianapolis & Western Railroad Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, The Cincinnati Northern Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Detroit, Toledo and Ironton Railroad Company, Erie Railroad Company, Evansville, Indianapolis & Terre Haute Railway Company, Georgia, Florida & Alabama Railway Company, Georgia Railroad, Georgia

Southern and Florida Railway Company, Glenmora & Western Railway Company, Grand Trunk Railway Sys-
[fol. 6] tem, The Green County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, The Hocking Valley Railway Company, Illinois Central Railroad Company, Jackson and Eastern Railway Company, Kosciusko and South Eastern Rail Road Company, The Lake Erie and Western Railroad Company, Lehigh Valley Railroad Company, Louisville, New Albany & Corydon Railroad Company, The Michigan Central Railroad Company, The Minneapolis & St. Louis Railroad Company (W. H. Bremner, Receiver), Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Mississippian Railway, Missouri-Illinois Railroad Company, Missouri Pacific Railroad Company, Mobile and Ohio Rail Road Company, The Monongahela Railway Company, Morgan's Louisiana and Texas Railroad and Steamship Company, Muscle Shoals, Birmingham and Pensacola Railroad (W. B. Harbeson, Receiver), The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Northern Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, New York, Ontario and Western Railway Company, Norfolk and Western Railway Company, Northern Alabama Railway Company, The Northern Ohio Railway Company, Pearl River Valley Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, Pittsburgh, Chartiers & Youg-
[fol. 7] hiogheny Railway Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Lisbon & Western Railroad Company, The Pittsburgh & West Virginia Railway Company, St. Louis-San Francisco Railway Company, Seaboard Air Line Railway Company, The South Buffalo Railway Company, The South Georgia Railway Company, Southern Railway Company, Sumter and Choctaw Railway Company, Tennessee Central Railway Company, Tennessee, Alabama and Georgia Railway, Toledo, St. Louis and Western Railroad Company (Walter L. Ross, Receiver), The Tuskegee Railroad Company, Wabash Railway Company, The Western Rail-

way of Alabama, The Wheeling and Lake Erie Railway Company, Winston-Salem Southbound Railway Company, The Yazoo and Mississippi Valley Railroad Company, Defendants.

PETITION—Filed February 6, 1933

The petition of the above-named plaintiffs respectfully shows:

1. That the petitioner, W. P. Brown & Sons Lumber Company, is and was at the times herein mentioned, a corporation duly organized and existing under the laws of the State of Kentucky, residing and having its principal office at Louisville, Kentucky, in the Western District of Kentucky, and chiefly engaged in the manufacture and buying and selling of lumber and other forest products.

2. That there is filed herewith, as a part hereof, marked Exhibit "A," a statement showing the names of the petitioners herein and the location of their principal offices. That said petitioners, or their assignors, are and were at the times herein mentioned, engaged in the manufacture and/or buying and selling of lumber and other forest products and in shipping same in interstate commerce. That said petitioners are joined herein as plaintiffs, under [fol. 8] and by authority of Section 16 of the Act to Regulate Commerce, approved February 4, 1887, as amended and supplemented.

3. That petitioner, H. C. Berckes, is the duly appointed and acting Secretary-Manager of the Southern Pine Association, a corporation rendering services to manufacturers and dealers in lumber and forest products, among whom are and were at the times herein mentioned, the following:

Wausau Southern Lumber Company,
Marathon Lumber Company,
Lehr Lumber Company,
Long-Bell Lumber Company,
Henderson-Molpus Company,
Eastman-Gardner & Company,
Rutledge & Company,
J. R. Buckwalter Lumber Company,
Gilchrist-Fordney Company,
Natalbany Lumber Company,

That the companies aforesaid had certain claims for reparation against certain of the defendants herein, for illegal freight charges collected by said defendants on shipments of lumber and other forest products, which charges the said companies paid and bore or bore; that said companies assigned said claims to this petitioner, and this petitioner was awarded reparation thereon, by order of the Interstate Commerce Commission, against the said defendants, as hereinafter more fully set forth. That the Edward Hines Yellow Pine Company, petitioner herein, had similar claims against certain of the defendants herein and was awarded reparation by the Interstate Commerce Commission, as hereinafter appears; and that the said company has assigned to the petitioner H. C. Berckes, its claims and awards of reparation against said defendants. That H. C. Berckes is the assignee and successor of the claims and awards of the companies mentioned in this paragraph and files this his petition in his name, right and capacity, as assignee and successor of said claims and awards granted said companies.

4. That the defendant, Louisville and Nashville Railroad Company, is a corporation duly organized and existing under the laws of the State of Kentucky, with its principal office at Louisville, Kentucky, in the Western District of Kentucky, and as such corporation is now and was at the times mentioned herein, a citizen of and domiciled in the said State of Kentucky. That each of the other de- [fol. 9] fendants, named in the caption, is and was at the times herein mentioned a corporation duly organized and existing under the laws of one or more of the States of the United States, with its principal office and place of business therein, as set forth, so far as is known to petitioners, in Exhibit "B," filed herewith and made a part hereof. That the petitioners do not know and are unable to state the particular State or States of the United States wherein certain of the said corporations, as shown and indicated in Exhibit "B," were organized or wherein they were at any time, or now exist, or the particular State or States of which either of them was at any time or is now a citizen, or in which they were at any time or are now domiciled, but petitioners allege: That each of the defendants herein, at all of the times herein stated, did business as a corporation and in its corporate name, with one or more of these

petitioners; and each of said defendants, where the State in which it is organized and has its principal office is not shown herein, should and by right ought to be required either to set out fully and particularly in its answer to this petition, the particular States wherein it was incorporated and organized and wherein it is now existing, and the place of its principal office and business, and its citizenship and domicile, or each of said defendants should and of right ought to be estopped from denying its corporate existence or from requiring petitioners to allege either the place where either of said corporations was incorporated, or was at any of the times herein stated, or is now, existing, or the place of its principal office or business or domicile or citizenship; or, in lieu thereof, these petitioners should be permitted, upon leave of Court, when all of said facts are discovered, to make all necessary allegations touching such matters. That said defendants are joined herein, as defendants, under and by authority of Section 16 of the Act to Regulate Commerce, approved February 4, 1887, as amended and supplemented.

5. That this suit is filed under and pursuant to the authority contained in and conferred by the Statutes of the United States and particularly the Act To Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof and supplementary thereto.

6. That the defendants are, and were at the times herein mentioned, common carriers engaged in interstate commerce by railroads, and in the business of transporting passengers and property by railroads, for hire, over their lines of railways from various points of origin east of the [fol. 10] Mississippi River and south of the Ohio and Potomac Rivers, and from points of origin in Arkansas and Louisiana, to destinations on and east of the Mississippi River, principally in Central Territory; and as such common carriers were and are subject to the provisions of the Act To Regulate Commerce, approved February 4, 1887, and all acts amendatory thereof and supplementary thereto.

7. That the several petitioners herein caused to be delivered to the several defendants herein, and the said defendants received certain carload shipments of lumber, or other forest products, for transportation and delivery at

several points of destination; and thereafter the respective defendants, operating with certain other defendants caused each of the said shipments to be delivered at the respective points of destination.

8. That the said defendants, respectively made, and collected certain charges on said shipments; that these petitioners, respectively, paid and bore, or bore the charges thereon; that said charges, so collected, were illegal and unlawful and in violation of the provisions of the Interstate Commerce Act, insofar as they exceeded the legal, and just, and reasonable rates applicable thereto, at that time in force and effect and on file with the Interstate Commerce Commission, and resulted in direct damage and injury to these plaintiffs, as hereinafter set forth. That said damage, consisting of excessive and illegal charges, were caused by the violations, by the respective defendants herein, of the provisions of the Act To Regulate Commerce as amended and supplemented, and resulted from straight overcharges and/or from misrouting.

9. That these several petitioners did file complaints before the Interstate Commerce Commission, in the cases known and designated on the Dockets of said tribunal, as follows: "W. P. Brown & Sons Lumber Company v. Alabama Great Southern Railroad Company, et al., Docket No. 17068;" "Southern Pine Association and H. C. Berckes, Secretary-Manager thereof v. Alabama & Vicksburg Railway Company, et al. Docket No. 17858;" "Wausau Southern Lumber Company v. The Alabama Great Southern Railroad Company, et al. Docket No. 17224;" "Wausau Southern Lumber Company v. The Alabama Great Southern Railroad Company, et al. Docket No. 17298;" "American Lumber & Export Company, et al. v. The Alabama & Vicksburg Railroad Company, et al. Docket No. 17407;" and "Watters-Tonge Lumber Company, et al. v. The [fol. 11] Alabama Great Southern Railroad Company, et al. Docket No. 17957."

The complaint, bearing Docket No. 17068, was filed May 13, 1925, by W. P. Brown & Sons Lumber Company, a plaintiff herein, and covered two shipments of lumber on April 17th and August 8th, 1922, and numerous shipments thereof subsequent to May 13, 1923, from origins in Arkansas, Louisiana and Alabama to destinations on and east of the Mississippi River.

The complaint, bearing Docket No. 17858, was filed January 11, 1926, by Southern Pine Association and H. C. Berckes, Secretary-Manager thereof, a plaintiff herein, in behalf of numerous members of that association and others, as amended, and covered numerous shipments of lumber and other forest products, taking lumber rates, subsequent to 1920, including shipments pendente lite, from points in Alabama, Florida, Mississippi and Louisiana to destinations in Central Freight Association and trunk line territories.

The complaints, bearing Docket No. 17224 and Docket No. 17298, in which Wausau Southern Lumber Company, a plaintiff herein, was complainant, were filed on June 12, and July 10, 1925, respectively. Docket No. 17224 embraced 20 carloads of lumber from Laurel, Miss., to destinations in Ohio during 1924 and 1925. Docket No. 17298, as amended, embraced 125 carloads of lumber from Laurel to destinations in Ohio and New York during 1924 and 1925.

The complaint, bearing Docket No. 17407, in which American Lumber & Export Company and numerous others, plaintiffs herein, were complainants, was filed August 6, 1925, and covered numerous shipments of lumber of said complainants subsequent to August 6, 1922, including shipments pendente lite, from origins in Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina and Tennessee, to destinations east of the Mississippi River.

The complaint, bearing Docket No. 17957, in which Watters-Tonge Lumber Company, and numerous others, plaintiffs herein, were complainants, was filed January 21, 1926, and covered numerous shipments of lumber and other forest products taking lumber rates, of numerous complainants, subsequent to March 1, 1920, from origins in Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina and Tennessee to destinations east of the Mississippi River.

That these several petitioners, in said complaints, complained of the foregoing alleged violations of the Act [fol. 12] To Regulate Commerce and prayed (1) that the respective defendants named therein might be severally required to answer the charges therein contained; (2) that after due hearing and investigation an order or orders be made requiring the respective defendants to cease and de-

sist from exacting the illegal and unlawful charges aforesaid; and (3) that further order or orders be made requiring defendants to pay unto the respective complainants or to their assignee or assignees, by way of reparation for the unlawful charges herein described, such sum or sums as, in view of the evidence to be adduced therein, the said Interstate Commerce Commission should find the respective shippers had been damaged by the existence of the illegal and unlawful charges, on all shipments, made by them within the several periods therein severally specified, and until the date of the Commission's final order in the several proceedings; and (4) that such further order or orders might be made as the Commission might deem proper in the premises and as the plaintiffs' causes might appear to require.

Whereupon the aforesaid being at issue upon the several complaints and answers on file with the Interstate Commerce Commission and statements of the details of all such shipments, showing, among other things, date of shipment, the car number and initial, origin, destination, date of payment of freight, bill of lading routing, route of movement, weight, rate and amount of freight paid, rate and amount that should have been paid under the findings of the Commission, the amount of reparation due on the basis of the Commission's decisions, the original freight bills or true copies thereof, bills of lading and other evidence were duly submitted and offered as proof of damages before the Interstate Commerce Commission; and having been duly heard together, on order of the Commission, and having been submitted by the parties thereto, a full investigation of the matters and things involved therein having been had, the Commission did, on February 9, 1932, make an order authorizing and directing the several defendants herein to pay unto the several plaintiffs herein, on or before April 26, 1932, sums set opposite their respective names, as shown in said order, with interest on the respective amounts at the rate of 6 per cent per annum from the respective dates the charges were paid, as reparation on account of inapplicable rates charged for the transportation, or on account of the misrouting, as the case might be, of [fol. 13] numerous carloads of lumber, and other forest products taking lumber rates, from the various origin points to the various points of destination, hereinabove re-

ferred to. That a certified copy of the aforesaid order and opinion of the Interstate Commerce Commission is attached hereto and made a part hereof, marked Exhibit "C," wherein is shown the amounts of reparation awarded to each of the petitioners herein, respectively, as damages, and the names of the several defendants herein against whom said reparation awards were granted. In support of said order, there is filed herewith the Transcript of Evidence taken in said cases before the Interstate Commerce Commission and upon which said order is based.

10. That certain of the defendants herein did not comply with the aforesaid order of the Interstate Commerce Commission within the time limit set in such order. That subsequent to the said time limit and within the last few weeks, some of the defendants herein have paid some of the items of the reparation awarded by the Commission in and by the order aforesaid; that other items are in the process of settlement; but that the petitioners at the present time are not advised as to all of the items that are in the process of settlement, and therefore cannot at this time set forth accurately the said items. But petitioners say that on or before the day of trial of this case they will amend this their petition and will eliminate all items herein set forth in Exhibit "C" which have been paid at that time. That as to those items which have not been paid at this time the respective defendants herein continue to refuse to pay to the respective petitioners herein the sums herein set forth and specified in the order aforesaid.

11. Petitioners say that on or before the day of trial of this case they will file herein a statement covering all items of damages awarded which have not been paid at that time, showing (1) the name of the shipper, petitioner herein, who paid and bore or bore the illegal charges aforesaid; (2) item of shipment; (3) date shipped; (4) date charges were paid; (5) car initial and number; (6) point of origin; (7) destination; (8) routing, together with tariff authorities; (9) rates as charged, showing rate authority, weight and amount charged and collected; (10) rates that should have been charged, showing rate authority and amount; and (11) amount of reparation awarded by the Interstate Commerce Commission on each of said items.

Petitioners say that the reparation awards are listed in and are contained in the order of the Interstate Commerce [fol. 14] Commission, copy of which is filed herewith and made a part hereof, marked Exhibit "C," and can be easily identified therein; that said order shows the name or names of the defendant or defendants against which said awards were granted and said order is here referred to for the purpose of identifying the several defendants against whom the said awards were granted respectively.

Wherefore, petitioners pray that they may respectively recover from the respectively designated defendants the amounts set opposite their respective names in the table contained in and made a part of the order aforesaid of the Interstate Commerce Commission, filed herein as Exhibit "C," said amounts aggregating the sum of $32,974.77, with interest on the said several amounts therein set forth, at the rate of 6 per cent per annum from the respective dates the transportation charges were collected, as specified in the order of the Interstate Commerce Commission, and that an order be issued commanding the said defendants to pay, on or before a date certain, such sums set opposite their respective names, as have not been paid, together with interest as aforesaid, and that your petitioners be allowed a reasonable attorney's fee, to be fixed by the Court and taxed and collected against the several defendants herein in such proportions as the several amounts of reparation awarded against them respectively appears to the total amount of the judgments herein, as a part of the causes of this suit, and as is authorized by the statute in such case made and provided, and for their costs and disbursements in this action, and asks for process against the defendants.

J. V. Norman, Norman, Quirk & Graham, Attorneys for Plaintiffs.

[fol. 15] PLAINTIFF'S EXHIBIT "C" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 17224 [1]

WAUSAU SOUTHERN LUMBER COMPANY

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

Submitted May 6, 1930. Decided February 9, 1932

On further hearing, reparation awarded certain complainants on carload shipments of lumber, and other forest products taking lumber rates, from points east of the Mis-

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[1] This report also embraces No. 17068, W. P. Brown & Sons Lumber Company v. Alabama Great Southern Railroad Company et al.; No. 17298, Same v. Alabama Great Southern Railroad Company et al.; No. 17407, American Lumber and Export Company et al. v. Alabama & Vicksburg Railway Company et al.; No. 17858, Southern Pine Association v. Alabama & Vicksburg Railway Company et al.; No. 17957, Watters-Tonge Lumber Company et al. v. Alabama Great Southern Railroad Company et al.; No. 19522, South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 1), South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 2), South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 3), South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Atlantic Coast Line Railroad Company et al.; No. 19522 (Sub-No. 4), South Bend Chamber of Commerce for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 5), South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; and No. 19522 (Sub-No. 6), South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.

sissippi River and south of the Ohio and Potomac Rivers, [fol. 16] and from points in Louisiana and Arkansas, to destinations on and east of the Mississippi River, principally in central territory, based on previous findings of inapplicability and misrouting, made in the original report, 142 I. C. C. 521, as modified in the report on reconsideration, 176 I. C. C. 787.

G. F. Graham, Norman, Quirk and Graham, A. J. Ribe, and B. M. Angell for complainants.

H. L. Walker for defendants, Southern Railway System Lines, Edw. D. Mohr, for defendant, Louisville and Nashville Railroad Company, J. H. Wright for defendant, Illinois Central Railroad Company, William Burger for defendants, Mobile and Ohio Railroad Company, Louisville and Nashville Railroad Company, and Southern Railway System lines, and J. T. Quisenberry for defendants, Illinois Central Railroad Company, The Yazoo and Mississippi Valley Railroad Company, and Gulf and Ship Island Railroad Company.

Report of the Commission on Further Hearing

By the COMMISSION:

Exceptions were filed by complainants to the report proposed by the examiner.

In the original report herein, 142 I. C. C. 521, we found with reference to numerous carload shipments of lumber, and other forest products taking lumber rates, from points east of the Mississippi River and south of the Ohio and Potomac Rivers, and from points in Arkansas and Louisiana, to destinations on and east of the Mississippi River, principally in central territory; (1) that the applicable rates were those over the routes of movement, namely, over routes where the joint rates applied, the joint rates, over routes where the joint rates were not applicable, the lowest rates resulting from the application of the combination rule to the factors applicable to the through transportation, and where the charges collected were in excess of such applicable rates, the shipments were overcharged; (2) that those shipments which were delivered by complainants to defendants with complete routing instructions

to send such shipments over routes over which the joint rates did not apply, and which were forwarded over routes other than those designated, were misrouted and that com- [fol. 17] plainants were damaged thereby to the extent the charges collected were in excess of those applicable over the routes designated; and (3) that those shipments, which were delivered by complainants to defendants without routing instructions, or with incomplete routing instructions, and were forwarded over routes over which higher rates applied than would have been applied had the shipments been forwarded over the lowest-rated routes, or the lowest-rated routes consistent with complainants' routing instructions, as the case might have been, were misrouted, and that complainants were damaged thereby to the extent the charges collected were in excess of those applicable over such lowest-rated available routes. We directed the refund of the overcharges and the payment of damages resulting from the misrouting by the defendants responsible therefor and dismissed the complaints.

Refund of overcharges and payment of damages by reason of the misrouting were made by some defendants, but other defendants refused to do so. On December 13, 1928, these cases were set for further hearing with respect to the amount of reparation due complainants under the findings in the original report, which further hearings were held on January 28 and April 1, 1929. Through oversight an order reopening these cases for further hearing was not entered at the time of the entry of the order setting the cases for further hearing, and on May 3, 1929, we entered a nunc pro tunc order vacating the order of dismissal theretofore entered and reopening the cases as of December 13, 1928, with respect to the amount of reparation due complainants under the findings in the original report.

In 176 I. C. C. 787, on reconsideration, we modified the original report as to the applicable rates over certain routes on shipments embraced in Nos. 17407 and 17957 to destinations on the Chesapeake and Ohio Railway Company, Maysville, Ky., to Kanawha City, W. Va., inclusive, and to Ironton, Ohio. Pertinent details of the several complaints are set forth in the appendix.

At the hearings, the complainants in Nos. 17224, 17068, 17298, 17407, 17958, and 17957, enumerated in the findings hereinafter, other than Southern Pine Association, sub-

mitted evidence [2] showing that they made certain shipments [fol. 18] of lumber, and other forest products taking lumber rates, from and to the points and during the periods covered by our findings in the prior reports, some of which shipments were overcharged and the others misrouted, and paid and bore or bore the charges thereon. As a rule complainants, the consignors, sold the shipments f. o. b. destinations, the consignees paying the charges and deducting some from complainants' invoices. The other shipments were sold f. o. b. origins, complainants prepaying the freight charges and receiving no reimbursement therefor. These complainants also submitted statements, covering these shipments, in the form prescribed by Rule V of the Rules of Practice, supported in most instances by paid freight bills and other transportation papers. Freight bills pertaining to a few shipments were not offered in evidence due to the fact that the carriers with whom they had been filed had not returned them to complainants. No evidence as to the making of shipments or the paying and bearing of charges was offered in behalf of the other complainants in Nos. 17407, 17858, and 17957, or in behalf of the complainant in Nos. 19522 and 19522 (Sub-Nos. 1 to 6, inclusive). Defendants offered no evidence.

Evidence was offered as to some shipments delivered more than two years prior to the filing of the respective formal complaints and as to others delivered more than three years prior thereto. Claims based on misrouting of shipments which were delivered more than two years prior to the filing of the respective formal complaints and those based on inapplicability as to shipments which were deliv-

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[2] By agreement of the parties proof by the following complainants was made by affidavits: Bagdad Land and Lumber Company; Foster Creek Lumber and Manufacturing Company; Frost-Sibley Lumber Company; W. B. Harbeson Lumber Company; West Florida Lumber Company; Schuster Springs Lumber Company; Wisconsin-Alabama Lumber Company; M. E. Leake and R. F. Goodlett; trading as Leake & Goodlett; T. R. Miller Mill Company, Incorporated; O. D. Carlton, H. H. Hill, and J. T. Carlton, trading as King Lumber Company; and S. E. Lackey, J. L. Lackey, and V. R. Lackey, trading as S. E. Lackey Lumber Company.

ered more than three years prior to the filing of the respective formal complaints, except those protected from the running of the statute by the filing of informal complaints, are barred.

In No. 17407, complainants the King Lumber Company and the S. E. Lackey Lumber Company are described as corporations. There is no evidence as to shipments by such corporations, but evidence as to certain shipments was offered in behalf of O. D. Carlton, H. H. Hill, and J. T. Carlton, trading as the King Lumber Company, and in behalf of S. E. Lackey, J. L. Lackey, and V. R. Lackey, [fol. 19] trading as the S. E. Lackey Lumber Company. Defendants did not object to the receipt of evidence as to these shipments. No point has been raised as to the variance between the designation of these concerns as corporations in the complaint and the proof that they were actually individuals operating under the trade names shown in the complaint as corporate titles. The variance being one which could readily be corrected by amendment of the complaint, Key v. Goodall, Brown & Co., 7 Ala. A. 227; Stange v. Price, 191 Ky. 734; and the incorrect designation of these complainants manifestly not having misled defendants, in any way in the absence of objection we may ignore it, and consider the description of these firms as corporations as relating to the individual members who comprise the two firms doing business as styled in the complaint.

Certain complainants offered evidence as to alleged overcharges with respect to demurrage, reconsignment, switching, and transit charges. These charges are not in issue in these proceedings and are not covered by our findings in the prior reports, and no award of reparation may be made here concerning them. Evidence was offered by certain complainants in No. 17407 relating to one shipment from Stamps, Ark., and three shipments to Omaha, Nebr. The complaint in No. 17407 does not cover shipments from Stamps or shipments to Omaha, and reparation may not be awarded as to these shipments. As to three shipments of complainant W. B. Harbeson Lumber Company in No. 17407, the evidence shows that complainant did not pay or bear the charges thereon. Complainants, Eastman-Gardiner & Company, Gilchrist-Ford-

ney Company, Rutledge & Company, Lehr Lumber Company, and Marathon Lumber Company, in No. 17858 offered evidence as to certain shipments, which originated on the line of the New Orleans and Northeastern Railroad Company and were misrouted by that carrier, or, as to some shipments, by a connecting carrier, The Alabama Great Southern Railroad Company. Neither of these carriers are defendants in No. 17858, and no award of reparation may be made as to these shipments.

As to some of the shipments shown to have been misrouted, we are unable to determined whether the misrouting was occasioned by defendants on whose lines the respective shipments originated or by defendants who handled them as intermediate carriers. The shippers completely routed some of the shipments, partially routed [fol. 20] others, and as to still others furnished no routing instructions. Certain complainants urge that reparation for this misrouting be awarded against the initial and intermediate carriers jointly. To support a joint award against defendants, there must be joint liability, which is not shown here and, under ordinary circumstances, does not exist in cases of misrouting. An initial carrier, receiving a shipment for transportation, impliedly contracts with the shipper to forward it over the cheapest reasonably available route compatible with the shipper's routing instructions, if any. It is, therefore, obligated to route the shipment and to deliver routing instructions to its connecting carrier. Compare Duluth & Iron Range R. R. Co. v. C., St. P., M. & O. Ry. Co., 18 I. C. C. 485, 488, and Atlantic Lumber Co. v. Louisville & N. R. Co., 163 I. C. C. 598. In view of this obligation and the fact that evidence as to the responsibility of the initial and intermediate carriers for misrouting is entirely within the control of the carriers, we are of the opinion that proof that a shipment is misrouted anywhere before reaching its destination is sufficient to establish a prima facie case against the initial carrier. Inasmuch as the initial carrier has not rebutted the prima facie case of misrouting made against it, reparation as to these shipments will be awarded against the defendants on whose lines the shipments originated.

Complainant Southern Pine Association offered in evidence assignments in its favor of the rights to reparation on shipment embraced in No. 17858 of Wausau South-

ern Lumber Company, Henderson-Molpus Company, Eastman-Gardiner & Company, Rutledge & Company, J. R. Buckwalter Lumber Company, Gilchrist-Fordney Company, Marathon Lumber Company, Natalbany Lumber Company, Lehr Lumber Company, and Long-Bell Lumber Company, complainants therein. The complaint in No. 17858 as to shipments of complainant Wausau Southern Lumber Company is sufficiently broad to cover the shipments of that complainant in Nos. 17224 and 17298, and reparation on all shipments of the Wausau Southern Lumber Company, concerning which evidence was offered in these proceedings, will be awarded to the assignee by virtue of the assignment executed by it. Subsequent to the filing of the complaint in No. 17407, the corporate name of McGinnis-Burdette Lumber Company, complainant therein, has been changed to Burdette Lumber Company.

We find that complainants, W. P. Brown & Sons Lumber Company, a corporation, in No. 17068, Ross C. Smith and [fol. 21] Hampton S. Smith, trading as Acme Lumber and Coal Company, The Adams-Banks Lumber Company, a corporation, The Adams-Newell Lumber Company, a corporation, E. B. Teague, J. E. Chandler, and B. L. Frost, trading as Advance Lumber Company, The American Lumber and Export Company, a corporation, Bagdad Land and Lumber Company, a corporation, L. A. Baker, trading as Baker-Dyer Lumber Company, Birmingham Lumber Company, a corporation, Burdette Lumber Company, a corporation, under its former name of McGinnis-Burdette Lumber Company, Albert Russell and T. R. Simmons, trading as Cleveland Lumber Company, C. W. Cochran, trading as C. W. Cochran Lumber Company, C. G. Duffee, trading as Duffee Lumber Company, Foster Creek Lumber and Manufacturing Company, a corporation, Frost-Sibley Lumber Company, a corporation, W. B. Harbeson Lumber Company, a corporation, A. J. Gray and E. W. McKinley, trading as Jefferson Lumber Company, O. D. Carlton, H. H. Hill, and J. T. Carlton, trading as King Lumber Company, S. E. Lackey, J. L. Lackey, and V. R. Lackey, trading as S. E. Lackey Lumber Company, H. E. Leake and R. F. Goodlett, trading as Leake & Goodlett, John J. Laumer and J. M. Griffith, trading as Laumer Lumber Company and Laumer-Griffith Lumber Company, Magic City Lumber Company, a corporation,

T. R. Miller Mill Company, Incorporated, J. W. Oden and J. J. Elliott, trading as Oden-Elliott Lumber Company, L. F. Garrett, trading as Pocahontas Lumber Company, The Pioneer Lumber Company, a corporation, Reid Lumber Company, Incorporated, Schuster Springs Lumber Company, a corporation, Jay Smith Lumber Company, a corporation, Steel City Lumber Company, a corporation, The Standard Lumber Company, a corporation, West Florida Lumber Company, a corporation, and Wisconsin-Alabama Lumber Company, a corporation, in No. 17407, Watters-Tonge Lumber Company, a corporation, Henry G. Brabston, trading as Henry G. Brabston & Company, The Parker Lumber Company, a corporation, Pine & Cypress Manufacturing Company, a corporation, Nadawah Lumber Company, a corporation, J. R. Thames, trading as J. R. Thames & Company, W. M. Carney Mill Company, a corporation, A. J. Lowry, C. C. Brownlee, H. L. Haughton, J. P. Warner, Edwin S. Jack, and E. B. May, trading as Greensboro Lumber Company, E. V. Sanders, trading as E. V. Sanders Lumber Company, C. H. Sims and L. W. Morgan, trading as Simms-Morgan Lumber Company, The First National Bank of Birmingham, a [fol. 22] corporation, executor of the estate of E. A. Smith, deceased, D. F. Southard, J. B. Southard, and B. M. Southard, trading as Southard Lumber Company, Swift-Hunter Lumber Company, a corporation, and Williams Yellow Pine Company, a corporation, in No. 17957, and Edward Hines Yellow Pine Company, a corporation, in No. 17858, made shipments of lumber, and other forest products taking lumber rates, from and to the points and during the periods covered by our findings in the prior reports, some of which shipments were overcharged and the others misrouted, and paid and bore or bore the charges thereon; that they have been damaged thereby in the amount of the difference between the charges paid and those that would have accrued at the rates found applicable in the prior reports over the routes of movement, or over the routes the shipments should have moved, and are entitled to reparation, with interest, from the defendants named in the accompanying order and in the amounts therein shown.

We further find that complainant Wausau Southern Lumber Company, a corporation, in Nos. 17224, 17298, and 17858, and complainants Henderson-Molpus Com-

pany, Eastman-Gardiner & Company, Rutledge & Company, J. R. Buckwalter Lumber Company, Gilchrist-Fordney Company, Marathon Lumber Company, Natalbany Lumber Company, Lehr Lumber Company, and Long-Bell Lumber Company, in No. 17858, made shipments of lumber, and other forest products taking lumber rates, from and to the points and during the period covered by our findings in the prior reports, some of which shipments were overcharged and the others misrouted, and paid and bore or bore the charges thereon; that they have been damaged thereby in the amount of the difference between the charges paid and those that would have accrued at the rates found applicable in the prior reports over the routes of movement, or over the routes the shipments should have moved; that Southern Pine Association, a corporation, complainant in No. 17858, has succeeded to the rights of the said Wausau Southern Lumber Company, Henderson-Molpus Company, Eastman-Gardiner & Company, Rutledge & Company, J. R. Buckwalter Company, Gilchrist-Fordney Company, Marathon Lumber Company, Natalbany Lumber Company, Lehr Lumber Company, and Long-Bell Lumber Company, to reparation herein and is entitled to an award of reparation against defendants and in amounts as shown in the accompanying order.

[fol. 23] Reparation to complainants in Nos. 17407, 17858, and 17957, other than those to whom an award of reparation is made herein-above, is denied.

An order awarding reparation to the complainants entitled thereto under the above findings will be entered in Nos. 17224, 17068, 17298, 17407, 17858, and 17957. The complaints in Nos. 19522 and 19522 (Sub-Nos. 1 to 6, inclusive), will be dismissed.

BRAINERD, Commissioner, concurring in part:

In the report on reconsideration I concurred in the award of reparation for the reason that I was of the opinion that while the rates charged were applicable, they were nevertheless unreasonable. In the instant report, I am unable to agree with the conclusions of the majority as to the fact of misrouting; in the opinion that the facts shown in the instances specifically dealt with establish a prima facie case of misrouting against the initial carrier; or to the awards of reparation based thereon.

LEE, Commissioner, concurring in part:

I concur in the conclusions of the majority, except in the award of reparation, on account of misrouting, against the intial carriers.

There was what may be termed a proper route over which each of the shipments should have moved, and, since the carriers are required to collect the published rate applying over the route of movement, any deviation of a shipment from the proper route ordinarily constitutes a misrouting which entitles the shipper to the damages resulting therefrom. The shipments were delivered to the initial carriers for transportation beyond their lines. They were shown to have been misrouted, but, and this is an important material fact not stated in the majority report, the misrouting of the shipments, that is, the actual deviation from the proper routes, occurred after the shipments had moved beyond the rails of the initial carriers, and occurred either on the line of an intermediate carrier or on the delivery of the shipments by such carrier to one of its connections. In fact, the record discloses on which one of the intermediate carriers the deviation occurred in each instance. To my mind it appears equally as probable that the misrouting was occasioned by the act or omission of an intermediate carrier as that it was due to dereliction on the part of an initial carrier. The initial carrier may have furnished proper [fol. 24] routing instructions in delivering the shipments to the intermediate carriers, and the latter may have failed to follow them. Or the initial carrier may have failed to furnish the intermediate carrier any routing instructions, in which event the intermediate carrier, by accepting the shipments without routing instructions, assumed responsibility for the subsequent routing. Duluth & Iron Range R. R. Co. v. C., St. P., M. & O. Ry. Co., supra. I doubt, therefore, if mere proof that a shipment was misrouted "anywhere before reaching its destination" justifies the inference or presumption that the initial rather than an intermediate carrier was responsible therefor. In view of the additional proof that the deviation did not occur on the lines of the initial carriers, but that it was the intermediate carriers that actually transported the shipments over the higher rated routes, the award should be made against the intermediate carriers on whose lines the misrouting occurred. Evidence disclosing responsibility for the misrout-

ing is as much within the control of the intermediate as the initial carriers. And, since it is the actual deviation of the shipments that resulted in damages, evidence showing that the intermediate carriers, and not the initial carriers, transported the shipments over higher rated routes, it seems to me, should be held to constitute a prima facie case against such intermediate carriers on whose lines the deviation occurred.

Commissioner Tate did not participate in the disposition of these cases.

Appendix

Details of Complaints

Nos. 17224 and 17298, in which Wausau Southern Lumber Company, a corporation, is complainant, were filed on June 12, and July 10, 1925, respectively. No. 17224 embraces 20 carloads of lumber from Laurel, Miss., to destinations in Ohio during 1924 and 1925. No. 17298, as amended, embraces 125 carloads of lumber from Laurel to destinations in Ohio and New York during 1924 and 1925.

No. 17068, filed May 13, 1925, and in which W. P. Brown & Sons Lumber Company, a corporation, is complainant, covers two shipments of lumber on April 17 and August 8, 1922, and numerous shipments thereof subsequent to May 13, 1923, from origins in Arkansas, Louisiana, and Alabama to destinations on and east of the Mississippi River.

[fol. 25] No. 17407, filed August 6, 1925, covers numerous shipments of lumber of numerous complainants subsequent to August 6, 1922, including shipments pendente lite, from origins in Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, and Tennessee to destinations east of the Mississippi River.

No. 17858, filed January 11, 1926, by Southern Pine Association, a corporation, in behalf of numerous members of that association and others, as amended, covers numerous shipments of lumber, and other forest products taking lumber rates, subsequent to 1920, including shipments pendente lite, from points in Alabama, Florida, Mississippi, and Louisiana to destinations in central freight association and trunk-line territories.

No. 17957, filed January 21, 1926, covers numerous shipments of lumber, and other forest products taking lumber rates, of numerous complainants subsequent to March 1, 1920, from origins in Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Tennessee to destinations east of the Mississippi River.

Nos. 19522, 19522 (Sub-No. 1), 19522 (Sub-No. 2), 19522 (Sub-No. 3), 19522 (Sub-No. 4), 19522 (Sub-No. 5), and 19522 (Sub-No. 6), the first four filed on April 4, 1927, and the others on May 7, 1927, and in which South Bend Chamber of Commerce, in behalf of St. Joseph Valley Lumber Company, is complainant, cover seven carloads of yellow pine lumber between October 30, 1923, and October 25, 1926, from origins in Alabama to destinations in Illinois, Michigan, Indiana, and New York.

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 9th day of February, A. D. 1932.

No. 17224

Wausau Southern Lumber Company

v.

Alabama Great Southern Railroad Company et al.

No. 17068

W. P. Brown & Sons Lumber Company

v.

Alabama Great Southern Railroad Company et al.

[fol. 26] No. 17296

Wausau Southern Lumber Company

v.

Alabama Great Southern Railroad Company et al.

No. 17407

AMERICAN LUMBER AND EXPORT COMPANY et al

v.

ALABAMA & VICKSBURG RAILWAY COMPANY et al

No. 17858

SOUTHERN PINE ASSOCIATION

v.

ALABAMA & VICKSBURG RAILWAY COMPANY et al

No. 17957

WATTERS-TONGE LUMBER COMPANY et al.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY et al.

No. 19522

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

No. 19522 (Sub-No. 1)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

No. 19522 (Sub-No. 2)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

[fol. 27] No. 19522 (Sub-No. 3)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

ATLANTIC COAST LINE RAILROAD COMPANY et al.

No. 19522 (Sub-No. 4)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

No. 19522 (Sub-No. 5)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

No. 19522 (Sub-No. 6)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

It appearing, That on May 8, 1928, the commission made and filed its report in the above-entitled proceedings, and that on May 3, 1929, the commission reopened these proceedings as of December 13, 1928, for further hearing with respect to the amount of damages and reparation due complainants under the findings in said report:

And it further appearing, That said further hearings has been had and that the commission, on the date hereof, has made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said report and the report of May 8, 1928, are hereby referred to and made a part hereof:

It is ordered, In Nos. 17224, 17068, 17298, 17407, 17858, and 17957, that the defendants named in each of the groups shown in the table below, be, and they are hereby, authorized and directed to pay unto the complainants, whose names are shown opposite said groups, on or before April 28, 1932, the amounts set opposite their respective names in [fols. 28-51] said table, with interest thereon at the rate of 6 per cent per annum from the respective dates the charges were paid, as reparation on account of inapplicable rates charged for the transportation of numerous carloads of lumber, and other forest products taking lumber rates, from points east of the Mississippi River and south of the Ohio and Potomac Rivers, and from points in Louisiana and Arkansas, to destinations on and east of the Mississippi River.

[fol. 52] IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 9, 1933

Come the defendants, Alabama and North Western Railroad Company, The Alabama and Vicksburg Railway Company, The Alabama Great Southern Railroad Company, Alabama, Tennessee & Northern Railroad Corporation, Atlanta and West Point Rail Road Company, Atlanta & Saint Andrews Bay Railway Company, Atlantic Coast Line Railroad Company, Birmingham & Southeastern Railroad Company, Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessees), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Company, The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern and Florida Railway Company, The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Company, Lehigh Valley Railroad Company, Louisville and Nashville Railroad Company, Mississippian Railway, Mississippi Central

Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Nothern Railroad Company, Northern Alabama Railway Company, [fol. 53] Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Company, and The Yazoo and Mississippi Valley Railroad Company, and without waiving the demurrer heretofore filed herein but expressly relying thereon, for answer to paragraph numbered 3 of the petition filed herein deny that the Wausau Southern Lumber Company, Marathon Lumber Company, Lehr Lumber Company, Long-Bell Lumber Company, Henderson-Molpus Company, Eastman-Gardner & Company, Rutledge & Company, J. R. Buckwalter Lumber Company, Gilchrist-Fordney Company, and Natalbany Lumber Company, or any of said companies, had certain claims or any claims for reparation against certain of the defendants herein or any of the defendants herein for illegal or any freight charges collected by any of said defendants, on shipments of lumber or other forest products; and defendants deny that they have knowledge or information sufficient to form a belief as to whether or not any of said companies hereinabove mentioned paid and bore, or bore, any freight charges collected on said shipments; and defendants deny that they have knowledge or information sufficient to form a belief as to whether or not said companies or any of them assigned said alleged claims to the petitioner, H. C. Berckes, and deny that said petitioner was awarded reparation thereon by any order of the Interstate Commerce Commission against these defendants or any of them except by an order, a copy of which is filed with the petition as Exhibit "A," and which order was and is, as defendants claim, entirely void and of no effect; and defendants deny that the Edward Hines Yellow Pine Company had similar claims or any claims for illegal or any freight charges against any of the defendants herein or was awarded reparation by the Interstate Commerce Commission except by said order which was and is, as defendants claim, entirely void and of no

effect; and defendants deny that they have knowledge or information sufficient to form a belief as to whether or not said Edward Hines Yellow-Pine Company has assigned to the petitioner, H. C. Berckes, its claims or awards of reparation against these defendants, or any of such claims or awards, or as to whether or not H. C. Berckes is the assignee or successor of any claims or awards of any of the [fol. 54] companies mentioned above and which the petitioner alleges had assigned their claims to said petitioner, H. C. Berckes.

These defendants for answer to paragraph numbered 7 of the petition filed herein deny that they have knowledge or information sufficient to form a belief as to whether or not the several petitioners herein or any of them caused to be delivered to the several defendants herein or any of them, or as to whether or not said defendants or any of them received certain car loads of, or shipments of lumber, or other forest products, for transportation or delivery at several points of destination; and defendants deny that they have knowledge or information sufficient to form a belief as to whether or not thereafter the respective defendants operating with certain or any other defendants caused each of said shipments to be delivered at the respective points of destination; and defendants deny that they have knowledge or information sufficient to form a belief as to what were the certain shipments referred to in the petition or what were any of said shipments mentioned therein.

These defendants for answer to paragraph numbered 8 of the petition filed herein deny that they have knowledge or information sufficient to form a belief as to whether or not the defendants or any of them made or collected certain charges on said shipments or as to what charges are referred to in said paragraph of the petition; and defendants deny that they have knowledge or information sufficient to form a belief as to whether or not the petitioners, or any of them, paid and bore, or bore, the charges on any of said alleged shipments; and defendants deny that said charges or any of them were illegal or unlawful or in violation of any of the provisions of the Interstate Commerce Act, or that they exceeded the legal or just or reasonable rates applicable thereto or at that time in force or effect or on file with the Interstate Commerce Commission or resulted in direct or any damage or injury to these plaintiffs or any

of them; and defendants deny that there were any excessive or illegal charges or that any damage consisting of such charges was caused by any violations by any of these defendants of the provisions of the Act To Regulate Commerce as amended and supplemented, and deny that any damage resulted from straight overcharges or from misrouting or that there were any overcharges or that there was any misrouting or any damage.

[fol. 55] Paragraph II

For further answer to the petition filed herein these defendants state that the plaintiff's action herein is a suit for the enforcement of various awards included in an order of the Interstate Commerce Commission entered on February 9, 1932, in Docket No. 17068, Docket No. 17858, Docket No. 17224, Docket No. 17298, Docket No. 17407 and Docket No. 17957, all being proceedings pending before the Interstate Commerce Commission; and that a copy of the order entered on February 9, 1932, is filed with the petition herein marked Exhibit "C."

These defendants state further that said order contains specific directions to the defendants to pay to certain of the complainants various amounts listed at the close of said order, but that said order of the Interstate Commerce Commission does not contain sufficient or necessary findings of fact upon which to base or sustain said awards of damages or any of them; and that said order does not state any of the ultimate facts from which said awards can be determined; and that said order does not show who were the shippers, who were the consignees, or the respective order in which the companies against whom the awards were made, transported such shipments; and that said order does not show as to said shipments the quantity of any of the particular shipments upon which the awards are based or the rates paid by the shipper for the service rendered, or whether or not the rates paid were in accordance with the established tariffs; and said order does not show what rates the said Commission found to be applicable to said shipments or in what tariffs said rates were published; and that said order does not show the amount of damages, if any, suffered in respect to any particular shipment or the number of shipments upon which said respective com-

plaints are allowed damages, and that said order does not show the facts as to any shipments so as to enable the court or the parties to determine what injury or damage, if any, the petitioners may have suffered as to any particular shipment; and does not state facts upon which any awards in favor of the complainants therein, petitioners herein, could be made in any sum whatever; and that said order does not include sufficient or necessary findings upon which to base an award of reparation under the Interstate Com- [fol. 56] merce Act or the amendments thereto; and that said order is therefore invalid and unenforceable in so far as it makes awards in favor of any of the complainants or against any of the defendants therein.

Paragraph III

For further answer to the petition filed herein these defendants state that the petitioners herein, or their assignors, were, as they allege, parties in Docket No. 17068, Docket No. 17858, Docket No. 17224, Docket No. 17298, Docket No. 17407 and Docket No. 17957, pending before the Interstate Commerce Commission; that between the points of origin and the points of destination involved in the complaints in all of said proceedings, there were lawfuly published through rates on lumber and articles taking lumber rates, effective at the time of all the shipments involved in said proceedings before the Interstate Commerce Commission.

These defendants further state that all of the shipments involved in said proceedings before the Interstate Commerce Commission were shipments which had been transported between points from and to which joint through rates on lumber and articles taking lumber rates had been published and were in effect; and that all of said shipments were transported over the route for said joint through rates unless the shippers directed otherwise; and that the rates charged and collected for said transportation were the legally established rates for transportation over the route of said joint through rates or over the routes on which said shipments were transported.

These defendants state further that despite the existence of said lawfully published through rates in effect at all of said times the complainants in said proceedings before the

Interstate Commerce Commission contended that Agent B. T. Jones Tariff, I. C. C. No. U. S. 1, provided for lower rates between the same points over routes different from those over which said established joint through rates applied; and that said Agent B. T. Jones Tariff contained the following provision, limiting the application of said tariff to transportation:

"Where no published through rates are in effect from point of origin to destination on lumber and articles taking same rates, or arbitraries over lumber rates, also other Forest Products, on which rates are not higher than on [fol. 57] lumber, carloads, and two or more commodity rate factors (see Note) are used in arriving at the through rate for a continuous rail shipment thereof, * * *."

Defendants state further that said Agent B. T. Jones Tariff does not apply in any case where joint published through rates are in effect from point of origin to point of destination and that said Agent B. T. Jones Tariff did not apply to any of the shipments involved in said complaints before the Interstate Commerce Commission, and that the holding of the Interstate Commerce Commission to the effect that said rates would and did apply to any of said transportation was erroneous and a wrongful interpretation of the meaning of the tariff; and that said question of interpretation is purely a legal question which is subject to determination by this court, and that the Interstate Commerce Commission was in error in interpreting said Agent B. T. Jones Tariff as applicable to transportation between any points from and to which published through rates were in effect; and that any award made by the Interstate Commerce Commission based upon the interpretation of said Agent B. T. Jones Tariff as applying to transportation between points where published through rates were in effect was erroneous, unlawful, and based entirely upon a wrongful interpretation of said tariff; and that all of the claims for reparation in said proceedings before the Interstate Commerce Commission were based upon said wrongful interpretation of Agent B. T. Jones Tariff, and that therefore all awards made by said Interstate Commerce Commission in any of said proceedings were erroneous, unlawful, void and contrary to the law.

Paragraph IV.

For further answer to the petition filed herein these defendants state that the awards of reparation contained in the last paragraph of the order of February 9, 1932, filed as Exhibit "C" to the petition, are based upon the interpretation of Agent B. T. Jones Tariff, I. C. C. No. U. S. 1, as being applicable to transportation between points from and to which there were in effect at that time joint through rates, when in fact a proper interpretation would not have held said tariff as applicable to said shipments; and that said Commission then announced in its findings as follows:

[fol. 58] "As to some of the shipments shown to have been misrouted, we are unable to determine whether the misrouting was occasioned by defendants on whose lines the respective shipments originated or by defendants who handled them as intermediate carriers. The shippers completely routed some of the shipments, partially routed others, and as to still others furnished no routing instructions. Certain complainants urge that reparation for this misrouting be awarded against the initial and intermediate carriers jointly."

These defendants state that the awards of reparation based upon misrouting were therefore shown to be without evidence to indicate who was responsible for the misrouting, if any carrier, and that any award of reparation against the initial or any other carrier was therefore unauthorized, arbitrary, void and unlawful; and that none of the awards of reparation based upon misrouting have any validity or effect whatever, both because of the fact that with a proper interpretation of Agent B. T. Jones Tariff there would have been no misrouting and because there were no facts before the Commission from which the Commission could determine the responsibility for such alleged misrouting, and the Commission was therefore without authority to make such awards.

Wherefore, having fully answered, these defendants pray that the petition herein be dismissed, for their costs herein expended and for all further and proper relief.

H. L. Walker, A. M. Warren, E. D. Mohr, Trabue, Doolan, Helm & Helm, J. Blakey Helm, Edw. P. Humphrey, Marvin H. Taylor, Attorneys for De-

fendants, Alabama and North Western Railroad Company, The Alabama and Vicksburg Railway Company, The Alabama Great Southern Railroad Company, Alabama, Tennessee & Northern Railroad Corporation, Atlanta and West Point Railroad Company, Atlanta & Saint Andrews Bay [fol. 59] Railway Company, Atlantic Coast Line Railroad Company, Birmingham & Southeastern Railroad Company, Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessees), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Company, The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern and Florida Railway Company, The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Company, Lehigh Valley Railroad Company, Louisville and Nashville Railroad Company, Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Northern Railroad Company, Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Company, The Yazoo and Mississippi Valley Railroad Company.

[fol. 60] IN UNITED STATES DISTRICT COURT

AMENDMENT TO PETITION—Filed June 11, 1934

Comes the plaintiffs, by counsel, and by leave of Court, amend their petition herein, and for such amendment says:

1. Plaintiffs amend the seventh literary paragraph of paragraph numbered 9, in their petition herein, to read as follows:

"That these several petitioners, in said complaints, complained of the foregoing alleged violations of the Act To Regulate Commerce, and brought in issue the reasonableness and the applicability under the published tariffs of the rates and charges collected on carload shipments of lumber and other forest products taking lumber rates from points of origin east of the Mississippi River and south of the Ohio and Potomac River and from points of origin in Arkansas and Louisiana to destinations on and east of the Mississippi River, principally in Central Territory. Certain of the shipments were also alleged to have been misrouted. In said complaints, said petitioners prayed (1) that the respective defendants named therein might be severally required to answer to charges therein contained; (2) that after due hearing and investigation an order or orders be made requiring the respective defendants to cease and desist from exacting the illegal and unlawful charges aforesaid; and (3) that further order or orders be made requiring the defendants to pay unto the respective complainants or to their assignee or assignees, by way of reparation for the unlawful charges herein described, such sum or sums as, in view of the evidence to be adduced therein, the said Interstate Commerce Commission should find the respective shippers had been damaged by the existence of the illegal and unlawful charges, on all shipments, made by them within the several periods therein severally specified, and until the date of the Commission's final order in the several proceedings; and (4) that such further order or orders might be made as the Commission might deem proper in the premises and as the plaintiffs' causes might appear to require. Whereupon, answers having been filed and hearings had; and the Examiner of the Interstate Commerce Commission having made his proposed report and exceptions having been filed thereto, and the cases having

been orally argued and submitted, the Interstate Commerce Commission, on May 8, 1928, rendered its decision and report and found as follows:

[fol. 61] "'We find that the Cincinnati rates applied from Covington to destinations on the Chesapeake & Ohio, Maysville to Kanawha City, inclusive, and to Ironton on the Norfolk & Western. The applicable rates on shipments to such destinations are those determined in accordance with our general conclusions elsewhere stated. There is no evidence to show that they were unreasonable.

"'We find that the applicable rates were those over the routes of movement, namely, over routes where the joint rates applied, the joint rates; and over routes where the joint rates were not applicable, the lowest rates resulting from the application of the combination rule to the factors applicable to the through transportation; and that where the charges collected were in excess of such applicable rates the shipments were overcharged.

"'We further find that those shipments which were delivered by complainants to defendants with complete routing instructions to send such shipments over routes over which the joint rates did not apply, and which were forwarded over routes other than those designated, were misrouted, and that the complainants were damaged thereby to the extent that the charges collected were in excess of those applicable over the routes designated.

"'We further find that these shipments which were delivered by complainants to defendants without routing instructions, or with incomplete routing instructions, and which were forwarded over routes over which higher rates applied than would have applied had the shipments been forwarded over the lowest-rated routes, or the lowest-rated routes consistent with complainants' routing instructions, as the case may be, were misrouted, and that the complainants were damaged thereby to the extent that the charges collected were in excess of those applicable over such lowest-rated available routes.

"'We further find that the rates legally applicable to the destinations on the Chesapeake & Ohio, Maysville to Kanawha City, inclusive, and to Ironton on the Norfolk & Western, embraced in No. 17957, are not shown to have been unreasonable.

"'The overcharges should be promptly refunded and the defendants responsible for the misrouting should pay to complainants the damages resulting therefrom.'

[fols. 62-83] "The said decision of the Commission is reported in 142 I. C. C. 521, and a certified copy of said report is filed herewith, as a part hereof, marked 'Exhibit X.' Pursuant to said findings and report of the Interstate Commerce Commission, certain refunds of overcharges and payments of damages by reason of misrouting were made by some defendants, but other defendants refused to make such refunds and payments. Accordingly thereafter these cases were reopened, and on December 13, 1928, they were set for further hearing with respect to the amount of reparation due complainants under the findings aforesaid, which further hearings were held on January 28 and April 1, 1929."

2. Plaintiffs amend paragraph numbered 11, in their petition herein, by adding thereto the following:

The defendants named in each of the groups in the table below (said defendants being designated by abbreviations which are explained in the Appendix to the order of the Interstate Commerce Commission filed herein and made a part hereof, marked "Exhibit C," and to which reference is here made) have paid unto the plaintiffs herein, whose names are shown opposite said groups, the amounts set opposite their respective names in said table, with interest as ordered, as reparation on account of inapplicable rates charged for the transportation of carloads of lumber, and other forest products, taking lumber rates, as ordered by the Interstate Commerce Commission, to-wit:

[fol. 84] 3. Plaintiffs further amend their complaint herein by adding Paragraph No. 12, thereto immediately proceeding the prayer thereof.

Paragraph XIII

Plaintiffs state that the rate situation that was before the Interstate Commerce Commission in his case can best be understood in the light of the circumstances which brought about such situation and by considering a representative shipment involved.

Originally rates on lumber from the pine belt in southern territory, to points north of the Ohio River, were published as separate factors to and beyond said river and the through rate was arrived at by adding such factors. Later these combinations were checked out and the lowest combination was generally published as the through one-factor rate. In June, 1919, by General Order No. 28, issued by the Director General of Railroads, rates on lumber were increased 25% subject to a maximum increase of 5 cents per hundred pounds in any rate. In order to observe this maximum when through rates were made on combination, the Director General published the so-called "Combination Rule" here involved. Briefly stated, the rule provided that where combination rates on lumber aggregated more than 25 cents each factor was to be reduced 20%, subject to a maximum reduction of 5 cents on any one factor and to the sum of the factors so reduced there should be added 3 cents. At that time the rule had application to lumber rates from the south to points north of the Ohio River only in rare instances. On August 26, 1920, the Interstate Commerce Commission, in a proceeding styled Ex Parte 74, and reported in 58 I. C. C. 220, authorized general increases in all rates, such increases being limited to a maximum of 25% in rates south of the Ohio River, 44% in rates north of the Ohio River and 33⅓% in rates applying inter-territorially. In cases where the haul up to the Ohio River was long with a high rate therefor and the haul beyond the Ohio River was short with a relatively low rate, the increase of 33⅓% in the through rate resulted in a higher rate than resulted from increasing the separate factors 25% and 40% respectively.

The railroads continued in effect the "Combination Rule," above referred to, but changed it so as to provide that it should apply only when the aggregate of the in- [fol. 85] termediate rates exceeded 33½ cents and substituted 6½ cents for the previous maximum reduction or addition of 5 cents. In 1922 when the Interstate Commerce Commission, in Reduced Rates, 1922, 68 I. C. C. 676, ordered a reduction of 10% in all rates, the "Combination Rule" was again changed to apply only when the aggregate of the intermediate rates exceeded 30 cents and the maximum reduction or addition was reduced to 6 cents.

The rule as then amended was in effect at the time of the movement of the shipments here involved.

For several years after 1920 the railroads applied the aforesaid "Combination Rule," to shipments of lumber from the south or where same was not applied they made refunds on presentation of claims. In 1923 the southern roads for the first time, took the position that the rule did not apply in cases where there was a through rate by any route and undertook to amend their tariffs so as to specifically so provide, but the Interstate Commerce Commission declined to permit such amendment, 81 I. C. C. 745 and 93 I. C. C. 614.

Notwithstanding the ruling of the Interstate Commerce Commission the Southern carriers continued to refuse to apply the rule and were later joined by the northern carriers in such refusal and the shippers instituted the proceedings which resulted in the orders of the Interstate Commerce Commission, upon which this suit is brought.

A representative shipment in controversy herein, which illustrates the refusal of the southern carriers to apply the "Combination Rule" is that of Southern Railway Car No. 157851, from Natural Bridge, Ala., to Hamilton, Ohio. This shipment was delivered to the Northern Alabama Railway without routing instructions except "B. & O. delivery." There was then in effect a published joint through rate from Natural Bridge, Ala., to Hamilton, Ohio, of 34½ cents applying via Northern Alabama Railroad to Sheffield, Ala., thence Southern Railway to Chattanooga, Tenn., thence Cincinnati, New Orleans & Texas Pacific to Cincinnati, Ohio, thence Baltimore & Ohio to Hamilton, a total distance of 588.7 miles. There was another shorter route via which a combination rate of 33 cents applied, same being via Northern Alabama Railroad to Sheffield, Ala., thence Louisville & Nashville to Cincinnati, Ohio, thence Baltimore & Ohio to Hamilton, Ohio, a total distance of 509.1 miles. The Northern Alabama Railroad routed the shipment by the longer route, at [fol. 86] the higher rate and the Interstate Commerce Commission awarded reparation to the basis of the lower rate.

Wherefore, petitioners pray that they may respectively recover from the respectively designated defendants the

amounts set opposite their respective names in the tables set forth on pages 18 to 21, both inclusive, and pages 23 to 28, both inclusive, of their amended petition herein, said amounts aggregating the sum of $14,972.27, with interest on the said several amounts therein set forth, at the rate of 6% per annum, from the respective dates the transportation charges were collected, as specified in the order of the Interstate Commerce Commission, and that an order be issued commanding the said defendants to pay, on or before a date certain, said sums set opposite their respective names, together with interest as aforesaid, and that your petitioners be allowed a reasonable attorney's fee, to be fixed by the Court and taxed and collected against the several defendants herein, in such proportions as the several amounts of reparation, as aforesaid, awarded against them respectively, bears to the total amount of the judgment herein, as a part of the costs of this suit and as is authorized by the statute in such case made and provided, and for their costs and disbursements in this action, and such other relief as they may be entitled to.

Norman, Quirk & Graham, Attorneys for Petitioners.

[fol. 87] PLAINTIFFS' EXHIBIT "X" TO AMENDMENT TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 17224[1]

WAUSAU SOUTHERN LUMBER COMPANY

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY et al.

Submitted January 22, 1927. Decided May 8, 1928

On shipments of lumber and other forest products taking lumber rates, in carloads, from points east of the Missis-

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[1] This report embraces also No. 17068, W. P. Brown & Sons Lumber Company v. Alabama Great Southern Railroad Company et al.; No. 17298, Wausau Southern Lumber Company v. Alabama Great Southern Railroad Com-

sippi River and south of the Ohio and Potomac Rivers, and from points in Louisiana and Arkansas, to destinations on and east of the Mississippi River, principally in central territory, combination rates treated by the combination rule found applicable over certain routes although joint rates were in effect between same points over other routes. Shipments found to have been overcharged or misrouted. [fol. 88] Refund of overcharges and payment of damages for misrouting directed. Complaints dismissed.

G. F. Graham and Norman, Quirk & Graham for Wausau Southern Lumber Company, Southern Pine Association, and W. P. Brown & Sons Lumber Company; A. J. Ribe for American Lumber & Export Company and others; and B. M. Angell for Watters-Tonge Lumber Company and others.

A. A. Adams and G. F. Graham for Edward Hines Lumber Company and Edward Hines Yellow Pine Company; and D. G. Hitchcock for Southern Pine Association, interveners.

Chas. J. Rixey and H. L. Walker for Southern Railway system lines and Mobile & Ohio Railroad Company; E. A. Smith for Illinois Central Railroad Company and Yazoo & Mississippi Valley Railroad Company; J. G. Kerr, N. W. Proctor, and Edw. D. Mohr for Louisville & Nashville Rail-

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pany et al.; No. 17407, American Lumber & Export Company et al. v. Alabama & Vicksburg Railway Company et al.; No. 17858, Southern Pine Association v. Alabama & Vicksburg Railway Company et al.; No. 17957, Watters-Tonge Lumber Company et al. v. Alabama Great Southern Railroad Company et al.; No. 19522, South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 1), Same v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 2), Same v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 3), Same v. Atlantic Coast Line Railroad Company et al.; No. 19522 (Sub-No. 4), Same v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 5), Same v. Louisville & Nashville Railroad Company et al.; and No. 19522 (Sub-No. 6), Same v. Louisville & Nashville Railroad Company et al.

road Company; M. G. Roberts for St. Louis-San Francisco Railway Company; R. D. Hunter for Cleveland, Cincinnati, Chicago & St. Louis Railway Company; J. C. Rich and J. O. Gill for Gulf, Mobile & Northern Railroad Company; Marion B. Pierce and W. J. Kelly for Central Freight Association lines; and F. L. Speiden for certain southern carriers.

Report of the Commission

AITCHISON, Commissioner:

Exceptions were filed to the reports proposed by the examiner, and the cases were orally argued.

These complaints, filed on various dates from April 11, 1925, to January 21, 1926, are brought on behalf of numerous individuals, partnerships, and corporations, engaged in the manufacture and sale of lumber and other forest products. Collectively they bring in issue the reasonableness and the applicability under the published tariffs of the rates and charges collected on carload shipments of lumber and other forest products taking lumber rates from points of origin east of the Mississippi River and south of the Ohio and Potomac Rivers and from points of origin in Arkansas and Louisiana to destinations on and east of the Mississippi River, principally in central territory. Certain of the shipments are also alleged to have been misrouted. The periods covered by the complaints vary. One of them covers shipments as early as March 1, 1920. Three [fol. 89] of them specifically include shipments made during the pendency of this proceeding. Although there have been numerous informal complaints to stay the running of the statute of limitations, it is apparent that many of the claims on the early shipments are barred. The principal movement was during the years 1923, 1924, and 1925. At the hearing all allegations with respect to the reasonableness of the rates were withdrawn, except as to rates to destinations on the Chesapeake & Ohio, Maysville, Ky., to Kanawha City, W. Va., inclusive, and rates to Ironton, Ohio, on the Norfolk & Western. There is no prayer for future relief, as the measure of the rates here considered is under attack in other proceedings before us. The alleged misrouting is dependent on the question of tariff interpre-

tation, and that question therefore presents the principal issue for determination. Rates will be stated in cents per 100 pounds.

From the several points of origin to the several points of destination, there were joint or single-factor through rates, hereinafter collectively referred to as joint rates. There were also combination rates, subject to the so-called combination rule. The issues presented are whether the joint rates applied over all the routes, and, if not, whether the applicable rates over the routes over which the joint rates did not apply were the lowest full combinations of separately established factors by such routes, or the lowest rates resulting from the application of the combination rule to such factors.

Complainants' shipments may be divided into three classes: (1) Shipments specifically routed by complainants over routes over which joint rates did not apply, but over which the combination rates, as reduced by the combination rule, were lower; (2) shipments tendered to carriers unrouted, or with incomplete routes shown, which could have moved over routes over which combination rates, reduced by the combination rule, were lower than the joint rates applicable over other routes; and (3) shipments forwarded over initial carriers not participating in joint rates from points of origin to destinations, on which the straight combinations untreated by the combination rule were assessed. Defendants admit that the combination rule applied to the separately established rate factors applicable on this class of shipments.

Included in the above are certain shipments which were reconsigned in transit. Such shipments are through shipments and, under the tariffs here considered, were sub-[fol. 90] ject to the same transportation rates as were applicable on other through shipments.

Specific routings were shown in connection with the joint rates. In addition, some of the tariffs contained the following note:

The routing shown is that ordinarily and customarily used, and should be strictly observed by agents. If, from any cause, shipments are routed by carriers via other junction points but over the lines of carriers parties to this tariff, rates published herein will apply.

The above note is sometimes referred to as the "preferred-routing clause." Other of the joint-rate tariffs contained a similar clause reading as follows:

Routes shown herein are the routes ordinarily and customarily to be used and should be strictly observed by agents; but, if, for convenience of, or through error of, carriers parties to this tariff, shipments are sent via other junction points, but over lines of carriers parties to this tariff, rates named herein will apply.

In some of the joint-rate tariffs no similar rule appeared.

Defendants contend that the preferred-routing clause gave the carriers the privilege of using any route embracing the lines of carriers parties to the tariffs and applying the joint rates. For example, they contend that the legal rate from Laurel, Miss., to Columbus, Ohio, over the Gulf, Mobile & Northern to Ackerman, Miss., and the Illinois Central and its connections beyond was the joint rate of 43 cents. No joint rate was provided for specific application over this route, but the carriers embraced in this route were all parties to the joint-rate tariff, which carried the preferred-routing clause. Complainants claim a rate of 40.5 cents, which is the combination rate produced by the combination rule.

In cases dealing with the preferred-routing clause we have uniformly held that where a shipment moves in accordance with shipper's specific routing instructions, the shipper cannot claim the benefit of a lower-rated route under this clause. Dort Motor Car Co. v. Director General, 59 I. C. C. 374. In Page & Hill v. C., St. P. M. & O. Ry. Co., 52 I. C. C. 495, we said:

While the rule cited and relied upon by complainant covers deviations in routing "from any cause whatsoever" and is not in terms restricted to the carriers' initiative, its manifest purpose is, not to give shippers a choice of routes, but to protect the published joint rates whenever the car- [fol. 91] riers find it expedient or necessary to resort to other routes in order to move traffic.

In the instant case, the carriers are seeking to take advantage of the preferred-routing clause, and not the shippers. The record indicates that only one shipment not routed by the shipper moved over a route not specifically shown in the joint-rate tariffs. Movement at the specific direction of shippers cannot be considered as having been

made at the option of the carriers or "for convenience of, or through error of, carriers." The preferred-routing clause does not, therefore, cover shipments forwarded in pursuance of specific routing instructions from the shipper. It is an emergency carriers' convenience rule. Its effect is merely to enable the carriers, when for operating reasons they find it expedient or necessary, to move a routed shipment over other than the designated route or an unrouted shipment over other than the lowest-rated route, and to protect on such shipments the rates applicable over the routes over which the shipments should have moved. It does not relieve carriers of the obligation of protecting, on an unrouted shipment, the rate over the lowest-rated route available, nor does it deprive a shipper of his right, on a shipment routed by him, to the rate applicable over the route designated when that rate is lower than the rate in effect over the route used by the carriers. Defendants' position with respect to the preferred-routing clause is untenable.

The combination rule was originally published by the director general about seven months after the issuance of General Order No. 28, as an emergency tariff provision to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts. Shortly after the general increase of 1920 the rule was amended substantially to reflect the increases then authorized. It was subsequently further amended to reflect the general reduction of 1922, and is still in effect. It reads in part as follows:

Where no published through rates are in effect from point of origin to destination on Lumber and articles taking same rates, or arbitraries over Lumber Rates, also other Forest Products, on which rates are not higher than on Lumber, carloads, and two or more commodity rate factors (see Note) are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner (either where such commodity rate factors cover entire haul from origin to [fol. 92] destination, or where used in connection with one or more class rate factors):

The formula which follows provides that the separately established commodity rate factors, except where they do not aggregate more than 30 cents, should be reduced by

amounts ranging from 0.5 cent for factors under 4 cents to 6 cents for factors 29 cents or over, and that 6 cents should be added to the sum of all factors. This rule has remained substantially the same since its first publication in February, 1919, except that the arbitraries and other amounts shown therein were increased on December 1, 1920, and reduced on July 1, 1922, to reflect the general increase and reduction.

The joint rates on lumber from and to the points here considered rarely exceeded the combination rates over other routes even when reduced by the use of the combination rule, until after the general increase of 1920. Owing to the variance in the percentage increases in rates authorized within and between the territorial groups, 25 per cent south of the Ohio River, 40 per cent north thereof, 35 per cent west of the Mississippi River, and 33⅓ per cent in the interterritorial joint rates, the formula did not produce exact results, but, as effective December 1, 1920, was designed to increase combination rates approximately 33⅓ per cent.

With minor exceptions, the instances where joint rates on lumber exceeded combination rates treated by the combination rule do not now exist, and have not existed since November 20 and 21, 1925, on which dates there became effective schedules suspended in Investigation and Suspension Docket No. 2449, the order of suspension in which was vacated after an informal conference. In some of these schedules, the routes to the Ohio River and joint-rate routes to points beyond were harmonized, and in others the routing limitations previously carried in connection with the joint rates were canceled, leaving such joint rates in effect over all routes.

Complainants' position is that the combination rule applied to shipments which moved, or which, without departing from routing instructions of the shipper, might have moved over routes over which there were no joint rates, notwithstanding the fact that joint rates were in effect over other routes between the same points of origin and destination. Defendants' position is that the combination rule did not apply where the initial carrier published a joint rate from point of origin to destination over any route.

[fol. 93] We have repeatedly held that, within reasonable limitations, ambiguities in a tariff must be resolved against the framer and in favor of the shipper. Brenner Lumber Co. v. Director General, 81 I. C. C. 241. In the instant case, defendants contend that the language of the combination rule is plain and unambiguous, and that the meaning which it conveys is exactly the meaning the carriers intended it to have, namely, that it applies "where no published through rates are in effect from point of origin to destination." They urge that the rule makes no reference to routes and therefore that the establishment of a joint rate over a single route precludes the application of the rule to the separately established factors applicable over other routes. They admit, however, that the "published through rate," namely, the joint rate, must apply over the line of the initial carrier of the route used, or designated by the shipper, in order to preclude the application of the rule to separately established factors. The interpretation contended for by complainants is no more inconsistent with a literal application of the rule than is that admitted by defendants to be proper.

The mills in the pine-producing section of the Mississippi Valley, south of the Alabama & Vicksburg, on and east of the Mississippi River, and on and west of the Mobile & Ohio, are in one group, and one rate applies to each destination in central territory. This grouping has existed for many years. Defendants urge that if the tariffs had been applied as complainants contend, the rates applicable on the shipments from points in this group would have varied preferentially and prejudicially as prohibited by the act. They also point out that the application of the combination rule in accordance with complainants' contentions would have resulted in a number of violations of the long-and-short-haul clause of section 4. For example, the combination rate of 40.5 cents claimed by complainants on shipments from Laurel to Columbus over the Gulf, Mobile & Northern by Ackerman and the Illinois Central and its connections is lower than the rate of 41.5 cents which applied from Ackerman to Columbus. A joint rate of 43 cents applied from Laurel and the entire group described above to Columbus, over the Gulf, Mobile & Northern via Jackson, Tenn., and the Illinois Central and its connections, did not apply through Ackerman and the Illinois Central. The lat-

ter route would short haul the Gulf, Mobile & Northern and is more circuitous than the route through Jackson.

[fol. 94] We have uniformly held, in cases where tariff situations similar to those here considered were presented, that the combination rule is applicable in the absence of a joint rate over the route traversed regardless of the fact that joint rates were applicable over other routes. Cancellation Rule for Combination Rates, 93 I. C. C. 614; M'Gowin-Foshee Lumber Co. v. A. F. & G. Ry. Co., 95 I. C. C. 451; Moore-Marshall Lumber Co. v. N. O. & N. E. R. R. Co., 112 I. C. C. 33; Gunther & Co. v. L. & N. R. R. Co., 112 I. C. C. 387 The arguments advanced by defendants in this proceeding in support of a contrary conclusion have been carefully considered, but we find nothing therein which warrants a reversal of our previous holdings on this question.

With reference to unrouted shipments, defendants rely upon Northern Pacific Ry. Co. v. Solum, 247 U. S. 477, 482, in which the Supreme Court said:

In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route. But the duty is not an absolute one. The obligation of the carrier is to deal justly with the shipper, not to consider only his interest and to disregard wholly its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only "if other conditions are reasonably equal." Resort to the more expensive route may be justified. And the justification may rest either upon the peculiar circumstances of a particular case or upon a general practice.

It should be noted that the Supreme Court held that the reasonableness of the use by a carrier of a more expensive route is an administrative question for this commission to determine. The joint rates and routes were usually established with the intent of giving the originating carrier the long haul, and defendants do not contend that the routes over which the joint rates applied were in all instances the shortest routes, or that the routes over which combination rates, as reduced by the combination rule, are sought to be applied were unreasonable routes. We do not consider that the particular circumstances of these cases justified

the use of the routes over which the higher rates were applicable.

Complainants in Dockets Nos. 17407 and 17957 contend that the Cincinnati, Ohio, rates applied from Covington, [fol. 95] Ky., to points on the Chesapeake & Ohio, Mayville to Kanawha City, inclusive, and to Ironton on the Norfolk & Western, under an intermediate rule, and in the latter docket complainants also contend that the applicable rates to these destinations, either joint or combination, were unreasonable to the extent that they exceeded the Covington combination treated by the combination rule, using as the factors from Covington the rates from Cincinnati as maxima. The pertinent portion of the intermediate rule relied upon by these complainants reads as follows:

From any point of origin not shown herein on the rails of the initial carrier the rates from the next more distant point shown herein will apply.

Cincinnati is shown as a point of origin in the tariff, while Covington is not so shown. Covington is directly intermediate between Cincinnati and the destinations named above. We find that the Cincinnati rates applied from Covington to destinations on the Chesapeake & Ohio, Maysville to Kanawha City, inclusive, and to Ironton on the Norfolk & Western. The applicable rates on shipments to such destinations are those determined in accordance with our general conclusions elsewhere stated. There is no evidence to show that they were unreasonable.

We find that the applicable rates were those over the routes of movement, namely, over routes where the joint rates applied, the joint rates; and over routes where the joint rates were not applicable, the lowest rates resulting from the application of the combination rule to the factors applicable to the through transportation; and that where the charges collected were in excess of such applicable rates the shipments were overcharged.

We further find that those shipments which were delivered by complainants to defendants with complete routing instructions to send such shipments over routes over which the joint rates did not apply, and which were forwarded over routes other than those designated, were misrouted, and that the complainants were damaged thereby to the extent that the charges collected were in excess of those applicable over the routes designated.

We further find that those shipments which were delivered by complainants to defendants without routing instructions, or with incomplete routing instructions, and which were forwarded over routes over which higher rates applied than would have applied had the shipments been forwarded over the lowest-rated routes, or the lowest-rated routes consistent with complainants' routing instruc-
[fol. 96] tions, as the case may be, were misrouted, and that the complainants were damaged thereby to the extent that the charges collected were in excess of those applicable over such lowest-rated available routes.

We further find that the rates legally applicable to the destinations on the Chesapeake & Ohio, Maysville to Kanawha City, inclusive, and to Ironton on the Norfolk & Western, embraced in No. 17957, are not shown to have been unreasonable.

The overcharges should be promptly refunded and the defendants responsible for the misrouting should pay to complainants the damages resulting therefrom. The complaints will be dismissed.

WOODLOCK, Commissioner, concurring:

I think it desirable to explain the reason why I concur in a decision of which some, at least, of the results are grossly inequitable. The facts of the case are recited in the report. Plainly stated they amount to this:

Prior to 1918 when General Order No. 28 was issued there were joint through rates from the lumber group, here concerned, to central territory applying over many routes. There were other routes between the same points over which joint through rates did not apply and the combinations over these routes were, in the great majority of cases, higher than the joint through rates. Following General Order No. 28 the so-called "combination rule" was published as a convenient method of preventing a double increase being reflected in through rates made on these combinations, while at the same time preserving the general relation of these rates to the joint through rates applying between the same points. This relation was, apparently, preserved until the general rate changes in 1920 and 1922. The effect of those changes was to dislocate it, as described in the report, leaving very many of the combinations, when treated by the rule, at a level below that of the joint through

rates between the same points. This manifestly improper relation was not corrected until November, 1925. Meanwhile complainants in some of these cases took the opportunity offered by the tariff situation to route their shipments over routes not covered by the joint through rates, and, later, claim these "treated" combinations as the applicable rates, and the instant report sustains their claims. Other complainants whose shipments were tendered to carriers, unrouted, made similar claims which are also sustained. Unfair as is this result, there appears to be no [fol. 97] way under the law to preclude it. I believe it to be our clear duty to make no decision, the consequence of which is clearly inequitable unless the law absolutely compels us thereto. In this case such compulsion appears to be present. There is no real ambiguity in the tariffs (notwithstanding reference thereto in the report) and the tariffs have the effect of law. We have no option in the matter. For that reason I am compelled to accept this report.

I take this opportunity, however, to say that it is high time that this emergency rule of tariff making be excised from carrier tariffs. Whatever reason existed for it in the years immediately following its invention has long since disappeared. Of late years it has proved a fruitful source of litigation in this forum, and has, in many cases, led to results as inequitable as those in the present case. Moreover, and this is at least equally important, it has led us to take the position, in the so-called Sligo Case, of saying, in effect, that one carrier can make a rate applicable over the line of another carrier without that other carrier's concurrence. I believe this to be wrong in principle. What a carrier may be said to "hold out" is one thing, and a legally applicable rate is another. It is with the latter that we are concerned. The former is the business of the courts of justice. By our awards of reparation in the cases following the "Sligo rule" we have usurped their function and it is regrettable that they have not up to this time been given an opportunity to pass upon the question.

BRAINERD, Commissioner, concurring in part:

Owing to the peculiar circumstances of these cases, I am of the opinion that the defendant carriers ought not to be found guilty of misrouting shipments that were delivered to them by the complainants unrouted, and which were trans-

ported by the defendants over the routes ordinarily and customarily used as specified in the through lumber tariffs containing the schedules of joint rates. There were numerous such routes. As said by the majority, it is ordinarily the duty of the carrier to transport by the cheaper route, but that duty is not an absolute one. There is no finding that on the shipments that moved over the lines taking the combination rates, through bills of lading showing such routing were issued, or that such shipments were transported on through billing, or that the total freight charges were collected as one item either by the delivering or the initial car- [fol. 98] rier, or that the carrier's agent responsible for any misrouting here found had notice or knowledge, actual or imputed, of the alternative route over which the combination rates applied, or that it was "The cheapest reasonable route known to him." Conf. Ruling 214 (c) (g). It is not found that these lines make a through route in fact either by express agreement or by course of business. See Through Routes and Joint Rates, 12 I. C. C. 163.

Relief is granted, as I understand the matter, upon the ground that the act of the carriers in transporting the shipments in question over the usual and customarily used routes and assessing the joint rate rather than transporting them over the routes taking the combination rates was, under the facts in this case, an unjust and unreasonable "practice" (denominated here misrouting) prohibited by paragraph (6) of section 1 of the act; that said practice resulted in an "unjust and unreasonable charge for such service" declared unlawful under paragraph (5) of section 1; and that the measure of damages sustained in consequence of such violation of the provisions of the act is prima facie the difference between the rates applicable over those routes, respectively. There is no other proof of actual damage; no showing of the intrinsic unreasonableness of either rate; none has been required by us in cases of this nature.

Here the rates charged were the only legal rates chargeable for the actual transportation service performed and are conceded to be reasonable. Under the peculiar circumstances thus presented, it seems to me that defendants have fully justified their conduct and that none of them can properly be charged with a breach of duty founded upon the obligation of the carriers to deal justly with their ship-

pers. Conversely, it is the shippers' duty to deal justly with the carriers. I, therefore, dissent from so much of the majority's report as finds that those shipments which were delivered by complainants to defendants without routing instructions, or with incomplete routing instructions, and which moved over the customarily used routes were misrouted, and that complainants were damaged thereby.

TAYLOR, Commissioner, dissenting:

The question involved in this proceeding is very simple. It is whether the combination rule which specifically provides that it only applies "where no published through [fol. 99] rates are in effect from point of origin to point of destination," can be used between a point of origin and a point of destination where a through joint rate does exist.

When General Order No. 28 became effective, a special supplement dated June 25, 1918, was issued to tariffs covering joint rates on lumber from the yellow-pine territory of the South to points of destination mainly located north of the Ohio River. This supplement added a fixed increase to each joint point-to-point rate existing at the time these increases became effective. A similar supplement was issued to make effective the increases authorized by Ex parte 74 in all joint point-to-point rates, on the same commodity, existing at that time.

The fact that joint rates did not at the time exist between all points of origin and all points of destination made necessary the creation of the combination rules, amended from time to time, to bridge this hiatus. This formula reads as follows:

Where no published through rates are in effect from point of origin to destination on Lumber and articles taking same rates, or arbitraries over Lumber Rates, also other Forest Products, on which rates are not higher than on Lumber, carloads, and two or more commodity rate factors (see Note) are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner (either where such commodity rate factors cover entire haul from origin to destination, or where used in connection with one or more class rate factors):

Language could not be plainer in its attempt to say that this rule was to be used only where no published through

rate was in effect from point of origin to destination. If any additional light was necessary upon this subject, it came from the words of Walter J. Kelly, the traffic expert who participated in the conferences which led to the creation of this formula, who testified under oath as follows:

To me that clause is very clear and precludes the application of this tariff in any instance where there is a through rate from point of origin to destination, on the commodity in question. There is no doubt about that in my mind at all, and from my participation in the conferences which led up to this tariff, I know that is what was intended.

The majority have approved the use of this formula in direct and positive contradiction to its terms, for the pur- [fol. 100] pose of creating rates from points of origin to points of destination where through rates exist, the result of which is to destroy the through one-figure rates in effect at the time. Such a decision as this, carried to its inevitable conclusion, would be followed by a train of deplorable results. Discriminations between individuals and localities would be created, the destruction of a nice adjustment of rates would be accomplished, and long-established groups of origin of the important commodity of lumber, moving in great volume from the long-leaf pine sections of the South, to many consuming points of destination beyond the Ohio River, would be broken up.

For these reasons I dissent from the conclusions of the majority.

Commissioner Porter did not participate in the disposition of these cases.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO ANSWER—Filed February 16, 1934

Come now the defendants, Alabama and North Western Railroad Company, et al., and by leave of court first had and obtained, amend the answer heretofore filed by them in this proceeding, by the insertion immediately following the last paragraph of Paragraph III of the said answer of the following:

Defendants further state that the rate situation that was before the Interstate Commerce Commission in the said

case known as Wausau Southern Lumber Company vs. A. G. S. R. R. Co., et al., 142 I. C. C. 521, I. C. C. Docket No. 17224 and related cases, and the issues that have arisen out of that rate situation, can best be understood by taking the rate on lumber from a typical shipping point in Southern Territory to a typical consuming point in Northern Territory—a rate that is representative of the rate situa-
[fol. 101] tion—showing what that rate was, the routes over which it applied under the provisions of the applicable tariff, the tariff rules and regulations affecting or applying to the said rate, the tariff rules and regulations upon which the complainants rely, and all other facts which are material to the proper consideration and determination of the problem of tariff construction that was before the Interstate Commerce Commission in the said Wausau Southern Lumber Company case and related cases, and is now before this Honorable Court in this proceeding.

A typical lumber shipping point in Southern Territory is Laurel, Mississippi, and a typical consuming point in Northern Territory is Columbus, Ohio. The joint through rate on lumber that was in effect from Laurel, Mississippi to Columbus, Ohio, during the period within which the shipments moved on which reparation is here claimed was 43 cents per hundred pounds. This joint through rate of 43 cents is contained in Speiden's Freight Tariff 57-F, I. C. C. No. 866. This tariff is described on its title page as

"Mississippi Valley—Middle States Lumber Tariff.

From

Points in Alabama, Kentucky, Louisiana, Mississippi, and Tennessee,

To

Points in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, New York, Ohio, Ontario, Pennsylvania, West Virginia, and Wisconsin."

Laurel, Mississippi is located on three roads: the Gulf, Mobile & Northern, the Gulf & Ship Island and the New Orleans & North Eastern. The joint through rate of 43 cents from Laurel, Mississippi to Columbus, Ohio, applied from Laurel by each one of these carriers as an initial or originating carrier; the routes over which this through rate

of 43 cents applied were specifically designated in the tariff, the name of each railroad making up the through route from Laurel to Columbus being shown. The tariff named 62 specific routes from Laurel to Columbus in connection with the Gulf & Ship Island as an originating carrier, 56 in connection with the Gulf, Mobile & Northern as an originating carrier, and 32 in connection with the New Orleans & North Eastern as an originating carrier, a total of 150 [fol. 102] different routes from Laurel to Columbus over which the joint through rate of 43 cents applied.

In addition to the routes thus specifically provided for in the tariff for the movement of lumber from Laurel, Mississippi to Columbus, Ohio, under the rate of 43 cents, there were a great many other routes made up of sections or parts of the railroads operating between Laurel and Columbus, over which this rate of 43 cents in question did not apply under the routing provisions in the tariff, the rate of 43 cents named in the tariff being restricted to apply only over the routes specifically designated therein. The rates applicable to the shipments that moved over the routes other than those specifically designated in the tariffs would be rates made up of the combination of local rates applying to such shipments. These combination rates were in every case made up of the rate from Laurel, Mississippi to Cincinnati, Ohio, plus the rate from Cincinnati, Ohio to Columbus, Ohio.

A typical route from Laurel, Mississippi to Columbus, Ohio, in connection with the Gulf, Mobile & Northern Railroad as an originating carrier, over which route the joint through rate of 43 cents applied, consisted of the railroad of the Gulf, Mobile & Northern from Laurel to Jackson, Tennessee, the railroad of the Illinois Central Railroad Company from Jackson to Louisville, Kentucky, and connections beyond Louisville.

A typical route from Laurel, Mississippi to Columbus, Ohio, in connection with the Gulf, Mobile & Northern Railroad as an originating carrier, over which route the joint through rate of 43 cents was not, under the provisions of the tariff, lawfully applicable, consisted of the railroad of the Gulf, Mobile & Northern from Laurel to Ackerman, Mississippi, the railroad of the Illinois Central Railroad Company from Ackerman to Louisville, Kentucky, and thence by connections beyond Louisville. As the joint

through rate of 43 cents did not apply via the route just described, the rate lawfully applicable to such a shipment as might move over that route would be the rate made up of the combination on the Ohio River. The rate via this route applying from Laurel, Mississippi to Cincinnati, Ohio, was 29½ cents per hundred pounds, and from Cincinnati to Columbus, Ohio, was 14 cents, a total 43½ cents or ½ cent greater than the joint through rate of 43 cents applying via the route specifically designated in the tariff. It will be later pointed out that if this combina- [fol. 103] tion rate of 43½ cents is treated by the so-called "combination rule," to which reference will later be made, the rate would be 40½ cents.

The question presented by this case is whether, in the case of shipments of lumber from Laurel, Mississippi to Columbus, Ohio, which were specifically routed by the shipper by the Gulf, Mobile & Northern Railroad as an originating carrier to Ackerman, Mississippi, thence by the Illinois Central Railroad to Louisville, Kentucky, and connections beyond, the rate lawfully applicable was the combination rate of 43½ cents, made up of the local rate of 29½ cents, applying over that route from Laurel to Cincinnati, Ohio, and the rate of 14 cents applying from Cincinnati to Columbus, Ohio, or that combination rate when treated by the so-called "combination rule," which would result in a rate of 40½ cents. The published through rate of 43 cents applying from Laurel, Mississippi to Columbus, Ohio, did not apply over the route of the Gulf, Mobile & Northern Railroad from Laurel to Ackerman, and thence over the route of the Illinois Central Railroad from Ackerman to Louisville and northern connections beyond. It is the contention of the plaintiffs in this proceeding that the rate lawfully applicable to shipments moving from Laurel to Columbus over the said routes made up of the Gulf, Mobile & Northern Railroad from Laurel to Ackerman, thence the Illinois Central Railroad to Louisville and northern connections beyond, was the combination of the local rate treated by the so-called "combination rule."

The shipments on which reparation is sought in this proceeding were either routed specifically by the shipper over routes over which the joint through rate did not apply under the provisions of the tariff, that is to say, in the case of the shipments made from Laurel, Mississippi to Colum-

bus, Ohio, the shipments were specifically routed by the shipper over the Gulf, Mobile & Northern Railroad as an originating carrier from Laurel, Mississippi to Ackerman, Mississippi, by the Illinois Central Railroad from Ackerman to Louisville, Kentucky, and thence by northern connections beyond, or were tendered to the originating carrier without any routing instructions, in which latter case the plaintiffs contend that the carriers were obligated to forward the shipments not over the routes over which the joint through rates applied as provided for in the tariff, but over routes for the transportation of lumber over which routes the combination basis was applicable.

[fol. 104] The tariff naming the joint through rate on lumber from Laurel, Mississippi to Columbus, Ohio (Speiden's Freight Tariff 57-F, I. C. C. No. 866), which joint through rate was restricted to apply over the routes specifically designated in the tariff, provided by Rule 318, the title of which rule is "Rules for Constructing Combination Rates," that—

"Except as otherwise indicated, rates published in tariffs and supplements thereto are subject to rules for constructing combination rates as provided in B. T. Jones' Tariff 228, I. C. C. U. S. 1, supplements thereto or reissues thereof."

The title page of B. T. Jones' Tariff 228, I. C. C. U. S. 1, contains this description of the tariff:

"Rules for Constructing Combination Rates on Commodities Enumerated in Tariffs as Amended (for continuous rail shipment)."

Section 4 of B. T. Jones' Tariff 228, I. C. C. U. S. 1, reads as follows:

"Section No. 4.

Reissue. Effective July 1, 1922, in Supp. No. 13

Substitute the following for Section 4, of tariff, as amended:

Lumber and Forest Productions, Carloads

Where no published through rates are in effect from point of origin to destination on Lumber and articles taking

same rates, or arbitraries over Lumber rates, also other Forest Products, on which rates are not higher than on Lumber, carloads, and two or more commodity rate factors (see Note) are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner (either where such commodity rate factors cover entire haul from origin to destination, or where used in connection with one or more class rate factors):

1. Where combination of separately established commodity rate factors is 30 cents per hundred pounds or less, such combination will apply.

[fol. 105] 2. Where combination of separately established commodity rate factors is over 30 cents per hundred pounds, the through rate will be made by adding 6 cents per hundred pounds, also the full class rate factor or factors without deduction, to the sum of the commodity rate factors for basing the through rates arrived at in the following manner.

(a) Where a separately established commodity rate factor is 30 cents per hundred pounds, or less, the factor for basing the through rate will be as shown in table of rates in Section 5.

(b) Where a separately established commodity rate factor is over 30 cents per hundred pounds the factor for basing through rate will be 6 cents per hundred pounds less.

NOTE.—Where the rates on commodities specified in Section 4, of tariff, are published as lettered Classes other than A, B, C, and D, in the Southern, Alabama, Florida, Georgia, Mississippi or Virginia Classifications or exceptions thereto, such factors will be considered commodity rates."

Section 5 of the aforesaid tariff provides that where the separately established commodity rate factor is 29½ cents, the factor for basing the through rate will be 23½ cents, and that where the separately established commodity factor is 14 cents, the factor for basing the through rate will be 11 cents.

Thus under the aforesaid rule for constructing combination rates where no published through rates are in effect from the point of origin to destination on lumber, the rate

from Laurel, Mississippi to Columbus, Ohio, that would apply via the Gulf, Mobile & Northern Railroad from Laurel to Ackerman, Mississippi, thence by the line of the Illinois Central Railroad from Ackerman to Louisville, Kentucky, and thence by northern connections beyond, if under the applicable tariffs the said rule for constructing combination rates may be lawfully applied, would be arrived at by adding together the basing factors of 23½ cents and 11 cents, or 34½ cents, and by adding to the sum of the commodity rate factors thus arrived at 6 cents, which gives a combination rate arrived at by the use of the combination rule contained in B. T. Jones' Tariff 228, I. C. C. U. S. 1, of 40½ cents.

The rate of 40½ cents from Laurel, Mississippi, to Columbus, Ohio, thus arrived at by the use of the combination rule contained in B. T. Jones' Tariff 228, I. C. C. U. S. [fol. 106] 1, is the rate that the plaintiffs contend lawfully applied to the shipment of lumber made from Laurel to Columbus and routed by the shippers via the Gulf, Mobile & Northern Railroad from Laurel to Ackerman, Mississippi, the Illinois Central Railroad from Ackerman to Louisville, Kentucky, and northern connections beyond. The plaintiffs also contend that in the case of any shipments delivered to the Gulf, Mobile & Northern Railroad at Laurel, Mississippi, without routing instructions, it was the duty of the carriers to forward the shipments over the route just described. the rate over which route, when arrived at by the use of the said combination rule, provided such rule may lawfully be used in view of the provisions of the applicable tariff in the construction of combination rates via that route, would be 40½ cents as compared with the joint through rate of 43 cents provided for in the published tariffs for the movement of lumber from Laurel to Columbus via the routes designated in the tariffs.

The joint through rate on lumber in effect at the time the shipments moved on which reparation is sought in this proceeding from Ackerman, Mississippi to Columbus, Ohio, Ackerman being an intermediate point between Laurel, Mississippi and Columbus, Ohio, was 41½ cents. The joint through rate applying to Columbus, Ohio from Laurel, Mississippi, a more distant point than Ackerman, Mississippi, was, as stated, 43 cents. There was, therefore, under this adjustment of rates no violation of Section 4 of the Interstate Commerce Act which provides that it shall

be unlawful for any common carrier subject to the Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

If the combination rule contained in B. T. Jones' Tariff 228, I. C. C. U. S. 1, may lawfully be used in constructing rates on lumber from Laurel, Mississippi to Columbus, Ohio, applying over the route of the Gulf, Mobile & Northern Railroad from Laurel to Ackerman, Mississippi, thence the Illinois Central Railroad from Ackerman to Louisville, Kentucky, and thence northern connections beyond, the rate from Laurel via this route would, as stated, be 40½ cents, whereas the rate from Ackerman, Mississippi, an [fol. 107] intermediate point, over the same line or route was 41½ cents, thus bringing about a violation of Section 4 of the Interstate Commerce Act.

Another example of how a violation of Section 4 of the Interstate Commerce Act is brought about if the combination rule under the applicable tariff may be lawfully applied to the construction of the combination rate over routes not authorized in the tariff naming the joint through rates on lumber, is illustrated by the rate from Laurel, Mississippi to Dayton, Ohio. The joint through rate on lumber from Laurel to Dayton, applying over the route specifically designated in the tariff, is 38 cents. This rate applies, for example, over the Gulf & Ship Island Railroad from Laurel to Jackson, Mississippi, thence over the Illinois Central Railroad to Louisville, Kentucky, and northern connections beyond. This joint through rate of 38 cents does not apply from Laurel to Dayton by way of the Gulf & Ship Island Railroad to Jackson, Mississippi, the Alabama & Vicksburg Railway from Jackson, Mississippi to Meridian, Mississippi, and connections beyond. If the combination rule contained in B. T. Jones' Tariff 228, I. C. C. U. S. 1, may lawfully be applied in constructing combination rates applying over the route just described, the rate would be 36½ cents from Laurel, Mississippi to Dayton, Ohio. But the joint through rate applying on lumber from Jackson, Mississippi, a point directly intermediate between Laurel, Mississippi and Dayton, Ohio, via the route last described, was 38 cents, or 1½ cents higher than the rate from the more distant point.

Wherefore, having fully answered, these defendants pray as in their answer heretofore filed.

Edward P. Humphrey, Marvin H. Taylor, A. M. Warren, Trabue, Doolan, Helm & Helm, Attorneys for Defendants, Alabama & North Western Railroad Co., The Alabama & Vicksburg Railway Co., The Alabama Great Southern Railroad Co., Alabama, Tennessee & Northern Railroad Co., Atlanta & West Point Rail Road Co., Atlanta & Saint Andrews Bay Railway Co., Atlantic Coast Line Railroad Co., Birmingham & Southeastern Railroad Co., Carolina, Clinchfield & Ohio Railway (Atlantic Coast Line Railroad Co. and Louisville & Nashville Railroad Co., Lessees), Chatta- [fol. 108] hoochee Valley Railway Company, Chicago Great Western Railroad Co., The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Co., DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern and Florida Railway Co., The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Co., Illinois Central Raiload Company, Kosciusko & Southeastern Railroad Co., Lehigh Valley Railroad Company, Louisville & Nashville Railroad Co., Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Co., New Orleans Great Northern Railroad Co., Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Co., The Yazoo and Mississippi Valley Railroad Company.

[fol. 109] IN UNITED STATES DISTRICT COURT

DEMURRER TO PETITION AS AMENDED—Filed June 11, 1934

Come the defendants, Alabama and North Western Railroad Company, The Alabama and Vicksburg Railway Company, The Alabama Great Southern Railroad Company, Alabama, Tennessee & Northern Railroad Corporation, Atlanta and West Point Rail Road Company, Atlanta & Saint Andrews Bay Railway Company, Atlantic Coast Line Railroad Company, Birmingham & Southeastern Railroad Company, Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, (Lessees), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Company, The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern and Florida Railway Company, The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Company, Lehigh Valley Railroad Company, Louisville and Nashville Railroad Company, Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Northern Railroad Company, Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Company, and The Yazoo and Mississippi Valley Railroad Company, and each and all of them demur to the plaintiffs' petition herein as amended, because it does not state facts sufficient to constitute a cause of action against any of said defendants.

E. A. Smith, Horace Walker, E. P. Humphrey, Marvin H. Taylor, Trabue, Doolan, Helm & Helm, Counsel for Above Mentioned Defendants.

[fol. 110] IN UNITED STATES DISTRICT COURT

DEMURRER TO ANSWER AND ANSWER AS AMENDED, OF CERTAIN DEFENDANTS—Filed June 11, 1934

Come the plaintiffs herein and each and all of them demur to Paragraph II, Paragraph III and Paragraph IV, and to each of said paragraphs, of the answer and to the amended answer, filed herein by the defendants, Alabama and North Western Railroad Company, The Alabama and Vicksburg Railway Company, The Alabama Great Southern Railroad Company, Alabama, Tennessee & Northern Railroad Corporation, Atlanta and West Point Railroad Company, Atlanta & Saint Andrews Bay Railway Company, Atlantic Coast Line Railroad Company, Birmingham & Southeastern Railroad Company, Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessee), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Company, The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Southern and Florida Railway Company, The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Company, Lehigh Valley Railroad Company, Louisville and Nashville Railroad Company, Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Northern Railroad Company, Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Company, and The Yazoo and Mississippi Valley Railroad

Company, because said paragraphs, or either of them, and the amended answer, do not state facts sufficient to constitute a defense herein.

Norman, Quirk & Graham, Attorneys for Plaintiffs.

[fol. 111] IN UNITED STATES DISTRICT COURT

MEMORANDUM—Filed June 22, 1934

I do not think the plaintiffs are entitled to the relief sought.

The case presents the single question of the proper construction of a rate tariff. This is a question of law, and while in such a case the decision of the Interstate Commerce Commission should be received with respect, and given that weight to which the experience of its membership in this field justly entitles it, such decision is not binding or controlling upon the Courts.

At the time of the shipments involved in this complaint there was in existence between the points of origin and destination of all such shipments lawfully published through rates on lumber and articles taking lumber rates, and the routes over which these through rates apply are not under attack as being unreasonable or impracticable. The contention of the plaintiffs is that by applying the so-called Combination Rule to combination rates existing over routes from points of origin to destination different from the route covered by the through rate, they could have secured a cheaper rate, and that as to those shipments thus routed by the shipper, they should have had the benefit of this cheaper rate; and where routing directions were not given by the shipper, it was the duty of the carrier to route the shipments over such combination rate route and apply to such combination rate the Combination Rule, thus giving the shipper a cheaper rate than the through rate referred to.

That part of the so-called Combination Rule requiring construction in this case reads as follows:

"Where no published through rates are in effect from point of origin to destination on lumber and articles taking same rates, or arbitraries over lumber rates, also other

forest products, on which rates are not higher than on lumber, carloads, and two or more commodity rate factors (see note) are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner:"

Then follows the formula for determining such combination through rate.

The quoted language seems to me clear and unambiguous, and as a legally established rate tariff has the force and effect of a statute, it should be construed in the same man- [fol. 112] ner as statutes are construed. Applying that rule of construction, there being no ambiguity in the wording of the tariff, it should be construed as written. The so-called Combination Rule, according to the plain wording of the language quoted, has no application except in those cases where there is no published through rate in effect from point of origin to destination. The record abundantly shows in this case that there was such published through rate in effect at the time of each of the shipments involved in this action. Therefore, it seems to me that there did not exist any occasion for the application of the Combination Rule as is insisted upon by the plaintiffs. As the tariff is plain and unambiguous, and is susceptible of only one meaning when the language thereof is given its ordinary and usually accepted meaning, there arises no occasion for the application of those aids to construction of statutes and rate tariffs resorted to by courts in those cases where the language is ambiguous or susceptible of more than one meaning.

It follows, therefore, that I am of the opinion that the Interstate Commerce Commission's reparation order, upon which this action is based, was founded upon an incorrect interpretation of the tariff under consideration; and further, of course, that the plaintiffs are not entitled to recover in this action such reparation awards.

As I recall, this action was submitted on the demurrer of the defendants to the plaintiffs' petition and amended petition, and on the demurrer of the plaintiffs to Paragraph II, III and IV of the answer; and counsel for the defendants will prepare order on said demurrers in accordance with the views here expressed and having submitted same to counsel for the plaintiffs, will tender same for entry, unless counsel for the parties prefer to treat the case as

having been submitted finally, in which event order will be prepared accordingly.

Charles I. Dawson, Judge.

[fol. 113] In United States District Court

Order Sustaining Demurrer and Dismissing Petition—Entered July 11, 1934

This action having been submitted on the defendants' demurrer to the petition as amended, and on the plaintiffs' demurrer to Paragraphs II, III and IV of the answer as amended, and the Court being advised,

It is now ordered that the demurrer to the petition as amended be, and it is, sustained, to which the plaintiffs, by counsel, except, and the demurrer to Paragraphs II, III and IV of the answer as amended, is overruled, to which plaintiffs, by counsel, except.

Whereupon came plaintiffs, by counsel, and declined to plead further, and it is now ordered that the petition herein, as amended, be and the same is hereby dismissed.

Entered this 11th day of July, 1934.

Chas. I. Dawson, Judge.

In United States District Court

Petition for Appeal—Filed Oct. 6, 1934

To the Hon. Charles I. Dawson, District Judge:

The plaintiffs herein, feeling aggrieved by the decree rendered and entered in the above-styled case on the 11th day of July, A. D., 1934, do hereby appeal from said decree to the Circuit Court of Appeals for the 6th Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and they pray that their appeal be allowed, citation or notice thereof having been waived by the defendants herein, which Waiver of Citation is filed herewith, and further pray that a transcript of the record, proceedings and documents, upon which said decree was based, duly

authenticated, be sent to the United States Court of Appeals for the 6th Circuit, under the rules of such court in such cases made and provided.

[fol. 114] And your petitioners further pray that the proper order relating to the required security to be required of them be made.

J. V. Norman, Norman, Quirk & Graham, Attorneys for Plaintiffs.

Have seen and copy received:

Trabue, Doolan, Helm & Helm, Marvin H. Taylor, Edw. P. Humphrey, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Entered October 6, 1934

The plaintiffs herein having tendered a petition for appeal and assignment of errors, on motion of J. V. Norman, Esq., attorneys for plaintiffs, it is hereby ordered that same be filed and that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the decree heretofore filed and entered herein be and the same is hereby allowed, and that a certified transcript of the record, exhibits, stipulation, and all proceedings be forthwith transmitted to the said United States Circuit Court of Appeals for the Sixth Circuit.

It is further ordered that the bond on appeal be fixed at the sum of $300.00.

This the 6th day of October, 1934.

Chas. I. Dawson, U. S. District Judge, Western District of Kentucky.

[fol. 115] Bond on appeal for $300.00, approved October 6, 1934, omitted in printing.

[fol. 116] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed October 6, 1934

Now come the plaintiffs, in the above entitled cause, and file the following Assignment of Errors, upon which they

will rely in their prosecution of the appeal in the above entitled cause, from the decree, made by this Honorable Court on the 11th day of July, 1934; and for such assignment of errors say:

I

That the United States Court for the Western District of Kentucky erred in sustaining the demurrer, filed by the defendants herein, to the petition as amended.

II

That the Court erred in overruling the demurrer, filed by the plaintiffs, to Paragraphs II, III and IV of the answer as amended.

III

The Court erred in ordering the petition herein, as amended, to be dismissed and in dismissing same.

IV

The Court erred in holding that the Interstate Commerce Commission's reparation order, upon which this action is based, was founded upon an incorrect interpretation of the tariff under consideration; and that the plaintiffs are not entitled to recover in this action such reparation awards.

V

The Court erred in holding that the Combination Rule, contained in the tariff under consideration, requiring construction in this case, and reading as follows:

"Where no published through rates are in effect from point of origin to destination on lumber and articles taking same rates, or arbitraries over lumber rates, also other forest products, on which rates are not higher than on lumber, carloads, and two or more commodity rate factors (see note) are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner."

[fol. 117] "has no application except in those cases where there is no published through rate in effect from point of origin to destination;" and in holding that "the record

abundantly shows in this case that there was such published through rate in effect at the time of each of the shipments involved in this action."

VI

The Court erred in failing to overrule the demurrer, filed by the defendants herein, to the petition as amended.

VII

The Court erred in failing to sustain a demurrer, filed by the plaintiffs herein, to paragraphs II, III and IV of the answer, as amended.

VIII

The Court erred in failing to find that the reparation order of the Interstate Commerce Commission, upon which this action is based, was founded upon the correct interpretation of the tariff under consideration; and in failing to find that the plaintiffs are entitled to recover in this action such reparation awards.

IX

The Court erred in failing to find that the Combination Rule, contained in the tariff under consideration, quoted above in Exception No. V, applied to the shipments involved in this action; and in failing to find that said tariff and Combination Rule, properly construed, means that the said Combination Rule applied, as to the shipments in question, where there was no published through rate over the route the shipments moved, or, in the absence of routing instructions, route over which they should have moved.

Wherefore, the appellants pray that said decree be reversed and that said District Court for the Western District of Kentucky be ordered to enter a decree reversing the decision of the lower Court in said cause.

J. V. Norman, Norman, Quirk & Graham, Attorneys for Appellants.

Have seen and copy accepted:

Edw. P. Humphrey, Marvin H. Taylor, Trabue, Doolan, Helm & Helm, Attorneys for Defendants.

[fol. 118] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD—Filed October 6, 1934

Come the parties hereto, by counsel, and stipulate that the transcript of record on appeal herein, may and shall consist of the following documents:

1. The original petition and Exhibit "C," filed therewith. (It is stipulated that Exhibits "A" and "B," lists of names and addresses of plaintiffs and defendants, filed with the original petition shall not be included in the transcript of record on appeal.)
2. The original answer filed by defendants to the original petition.
3. The amended petition and Exhibit "X," filed therewith by plaintiffs.
4. Amendment to the answer filed by the defendants.
5. Demurrer of the defendants to the petition as amended.
6. Demurrer of the plaintiffs to paragraphs 2, 3 and 4 of the answer as amended.
7. Opinion.
8. Order or decree of the Court, entered therein on July 11, 1934, sustaining the demurrer to the petition as amended, and overruling the demurrer to paragraphs 2, 3 and 4 of the answer as amended, and dismissing the petition as amended.
9. Plaintiffs' petition for appeal.
10. Order allowing appeal.
11. Waiver of citation or notice of appeal.
12. Plaintiffs' assignment of errors.
13. Stipulation as to contents of transcript of record on appeal.

J. V. Norman, Norman, Quirk & Graham, Attorneys for Plaintiffs. Trabue, Doolan, Helm & Helm, Edw. P. Humphrey & Marvin H. Taylor, Attorneys for Defendants, Alabama & North Western Railroad Co., The Alabama & Vicksburg Railway Co., The Alabama Great Southern Railroad Co., Alabama, Tennessee & Northern RR. Co., Alabama & West Point Rail Road Co., Atlanta & Saint Andrews Bay Railroad Co., Atlantic Coast Line Rail-

road Co., Birmingham & Southeastern Railroad [fol. 119] Co., Carolina, Clinchfield & Ohio Railway (Atlantic Coast Line Railroad Co. and Louisville & Nashville Railroad Co., Lessees), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Co., The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Co., DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern & Florida Railway Co., The Greene County Railroad Company, Gulf and Ship Island Railroad Co., Gulf, Mobile and Northern Railroad Co., Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Co., Lehigh Valley Railroad Company, Louisville & Nashville Railroad Co., Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Co., New Orleans Great Northern Railroad Co., Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Co., The Yazoo and Mississippi Valley Railroad Co.

[fol. 120] IN UNITED STATES DISTRICT COURT

WAIVER OF CITATION OR NOTICE OF APPEAL—Filed October 6, 1934

Come the defendants, Alabama & North Western Railroad Company, The Alabama & Vicksburg Railway Company, The Alabama Great Southern Railroad Company,

Alabama, Tennessee & Northern Railroad Company, Atlanta & West Point Rail Road Company, Atlanta & Saint Andrews Bay Railroad Company, Atlantic Coast Line Railroad Company, Birmingham & Southeastern Railroad Company, Carolina, Clinchfield & Ohio Railway (Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, Lessees), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Company, The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern & Florida Railway Company, The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Company, Lehigh Valley Railroad Company, Louisville & Nashville Railroad Company, Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Northern Railroad Company, Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Company, and the Yazoo and Mississippi Valley Railroad Company, by counsel, and hereby waive the service of citation or notice of appeal allowed herein.

Edw. P. Humphrey & Marvin H. Taylor, Trabue, Doolan, Helm & Helm, Attorneys for Defendants and Appellees Named Supra.

[fols. 121 & 122] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 123] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MINUTE ENTRY

Cause Argued and Submitted, February 5, 1936

Before Moorman, Hicks and Simons, JJ.

This cause is argued by J. Van Norman for Appellant and by Elmer A. Smith for Appellees and is submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Filed March 6, 1936

Appeal from the District Court of the United States for the Western District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

[fol. 124] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed March 6, 1936

Before Moorman, Hicks and Simons, Circuit Judges

SIMONS, Circuit Judge:

The controversy is between shippers of lumber and carriers in respect to construction of a rule in freight tariffs commonly known as the combination rule. An understanding of the point in dispute requires exposition of its historical setting.

From the principal sources of lumber supply in the south and southwest to the centers of consuming territory in the north are many rail routes served by numerous carriers.

Shipments of lumber move either at through rates or at combination rates from points of origin to their destination. The through rate is what its name implies, and the combination rate is made up of the local rates of carriers contributing to the route of movement. In 1916 the President of the United States took over control of railroads. By the Federal Control Act of 1918 he was authorized to initiate rates. Increases becoming necessary, by General Order 28 of the Director General of Railroads both through rates and local rates were raised. The result was that where shipments moved over a route for which there had been in effect a published through rate there was but one increase in that rate, but where it moved over a route served by a combination of carriers, each of whose local rates were increased but for which there was no published through rate, the shipper would pay a double and sometimes a triple increase in freight. To avoid the inequality between shippers having access to stations which published through rates and those which had not, the carriers published what is known as the combination or "Jones" rule, which so far as applicable is as follows:

"Where no published through rates are in effect from point of origin to point of destination on lumber and articles taking same rates, * * * such through rate will be arrived at in the following manner, * * *"

Then follows the formula by which the applicable rate is determined. The purpose of the rule was concededly to insure that a shipper whose rate was made up of two or [fol. 125] more local rates would pay but one increase in the total through rate, just as a shipper to whom was available a published through rate from the point of origin to destination would likewise pay but one increase.

The appellants shipped lumber over routes in respect to which there were no published through rates from point of origin to destination. The carriers collected freight on the basis of the local rates in effect over such routes without adjustment by the application of the formula. The shippers complained, and then initiated a proceeding before the Interstate Commerce Commission to obtain a refund of overcharges on the ground that the combination rule was applicable to their shipments. The Commission made awards of reparation on February 9, 1932, in what

is known as the case of Wausau Southern Lumber Co., et al., v. Alabama Great Southern Railway et al., 142 I. C. C. 521, 182 I. C. C. 731. While some of the carriers accepted the decision of the Commission, the present appellees stood their ground and in consequence the shippers filed suit in the court below under § 16(2), of the Interstate Commerce Act, 49 U. S. C. A. On demurrer to the petition the District Judge sustained the contention of the carriers that the combination rule was clear and unambiguous, requiring no construction, that the award of the Interstate Commerce Commission was based upon a conclusion of law and so not binding upon the court; found as a fact that there were through rates applicable to the shipments involved, concluded that the combination rule did not therefore apply to such shipments, and dismissed the petition. It is from the order of dismissal that the appeal is taken.

The first question to be determined is the conclusiveness of the Commission's awards. If the question were one of fact, or involved the exercise of administrative discretion, we are bound by the decision. The Commission, however, was asked to construe a railroad freight tariff. No question was before it as to reasonableness of rates, and while existence of through routes was involved, there was no controversy as to the fact, and no question decided as to the reasonableness of the routes. The question was one of law, and while great deference will be paid to the Commission's conclusions, we are not bound by them. Chicago, Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. [fol. 126] 97, 99; U. S. v. Missouri Pacific R. Co., 278 U. S. 269, 280. The problem of ascertaining the proper interpretation to be given to a tariff provision is akin to that to be given any other document. Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 291.

We come then to the wording of the combination rule. The formula is to be applied "where no published through rates are in effect from point of origin to point of destination." The language appears to be clear enough, and there is absent any express qualification thereon. The shippers would, however, have us insert a limitation. They say it necessarily means that the formula is to be applied where no published through rates are in effect over the route of movement, even though in effect over other routes, and that the clause should be interpreted as though it read, "Where

no published through rates are in effect (via route of shipment) from point of origin to point of destination," and that so it has been practically construed by carriers and shippers for many years. Freight tariffs must, however, be applied as written, Western Grain Co. v. St. Louis S. F. Ry. Co., 56 Fed. (2d) 160 (C. C. A. 5), and effect must be given if possible to every word, clause and sentence; Pillsbury Flour Mills Co. v. Great Northern Ry. Co., 25 Fed. (2d) 66 (C. C. A. 8); Chicago Great Western R. Co. v. Farmers' Shipping Ass'n, 59 Fed. (2d) 657 (C. C. A. 10); Updike Grain Corp. v. St. L. & S. F. Ry. Co., 52 Fed. (2d) 94 (C. C. A. 8). The practical construction of the parties to a contract is not permitted to defeat the clear language of the instrument. Norton Iron Works v. Standard Slag Co., 13 Fed. (2d) 622, 623 (C. C. A. 6). Where there is no occasion for construction, the court will be less hesitant to overturn a prior understanding, even though it may have been acted upon for many years. U. S. v. Mo. Pacific Ry. Co., supra, at 280. Further observations in that case in respect to construction by the Commission of a section of the Interstate Commerce Act are peculiarly applicable here.

"The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by [fol. 127] the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. * * * Construction may not be substituted for legislation."

It would seem to be clear that when lumber is offered for shipment to the carrier over a designated route, the initial inquiry by the carrier under the guidance of the rule must be as to the existence of a published through rate for the shipment to its destination. If there is no such rate the formula must be applied to a reduction of the combined local rates. If there is such published through rate, the formula is not applied. There is nothing complicated about it, and the shipper having a through rate available is subjected to no unreasonable or inequitable exaction.

The shippers contend, however, that the carriers themselves concede ambiguity to the rule by asserting it, not in strict literalness, but as though it read "Where no pub-

lished through rates (to which the initial carrier is a party) are in effect from point of origin to point of destination." This is to say that the combination formula must be applied only where there is no published through rate from point of origin to destination over the lines of the carrier receiving the shipment, notwithstanding there may be through rates over other lines. But the carriers reply that this is precisely what the rule says, that it can refer only to applicable rates, and that nothing has to be read into it to give it this meaning. This may be a complete answer, but even if not we fail to see how ambiguity in respect to one point in the rule compels interpolation of a limitation in respect to another point. Whether the lack of a published through rate over the lines of the receiving carrier, or the lack of any through rate, conditions the application of the formula, has no bearing upon whether the rule requires construction making applicable the formula where there is no through rate over the route of movement. In any event the point is not here involved because the shipments upon which refunds are claimed all originated with carriers who were parties to through published rates at the point of origin.

Finally it is urged that the decision in Baltimore & Ohio Railroad Co. v. Domestic Hardwoods, Inc., 65 Fed. (2d) 488 [fol. 128] (C. of A. D. C.), approving the construction of the Commission upon the rule before us, is conclusive of this case. Persuasive it might be, were its reasoning fully to commend itself to us. In what respect it controls our decision we are unable to understand. If upon the ground that certiorari was denied by the Supreme Court (290 U. S. 647), then the answer must be in the language of that court "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." Atlantic Coast Line Rd. v. Powe, 283 U. S. 401, 403; United States v. Carver, 260 U. S. 482, 490. The Court of Appeals of the District of Columbia in the B. & O. case sustained the Commission's construction on the ground that it was conceivable that through rates might be established over longer routes and through congested centers which would so increase costs and delay delivery as to be unavailable to shippers requiring dispatch, shipping perishable merchandise, and others. The court, however, apparently overlooked the fact that the Commis-

sion has power to require carriers to establish additional through routes whenever necessary or desirable in the public interest, and the power to fix rates over such routes under § 15, paragraph (3), of the Interstate Commerce Act, and that there was in that case no question in respect to the exercise of the administrative powers of the Commission. Likewise there is none here. Even so, the court recognized that it would have had no great difficulty in accepting the carriers' view were it not upon a question as to which the Commission had made a ruling, and it followed the Commission's ruling on the theory that the question involved a technical subject, as to which the Commission is presumed to have expert knowledge superior to that of the court. We perceive, however, no inherent technical question in determining whether the rule means what it says, and so find no occasion for adding to it a limitation which is nowhere implied and which no exigency requires. We are therefore unable to follow the reasoning of the Court of Appeals of the District of Columbia to its conclusion.

The order of the District Court is affirmed.

[fol. 129] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 130] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 131] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed October 21, 1936

It is hereby stipulated and agreed by and between counsel for appellants and appellees in the above-entitled cause

that the printed transcript of the record herein shall include the proceedings in the United States Circuit Court of Appeals for the Sixth Circuit, consisting of the opinion of the said Court and the certificate of the Clerk of the said Court, and the record in this cause in the District Court of the United States for the Western District of Kentucky, as printed in the transcript of record filed in the United States Circuit Court of Appeals for the Sixth Circuit, except the list of complainants, defendants and amounts appearing on page 28 and continuing to the top of page 52, inclusive, and except the list of plaintiffs, defendants and amounts appearing at pages 63 to 83, inclusive.

Dated this 20th day of October, 1936.

J. V. Norman, Counsel for Appellants. Elmer A. Smith, Counsel for Appellees.

[fol. 132] [File endorsement omitted.]

Endorsed on cover: File No. 40,640. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 100. W. P. Brown & Sons Lumber Company et al., petitioners, vs. Louisville & Nashville Railroad Company et al. Petition for a writ of certiorari and exhibit thereto. Filed June 3, 1936. Term No. 100, O. T., 1936.